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Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

OCTOBER TERM 2009

ARTEMIO MARCOS ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE ARTEMIO M. ABAD REVOCABLE TRUST; GLORIA PASCUA ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE GLORIA P. ABAD REVOCABLE,
Petitioners,

vs.

FINANCE FACTORS, LIMITED; CENTRAL PACIFIC BANK, SUCCESSOR-IN-INTEREST TO CITY BANK; DIRECTOR OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF HONOLULU; AMERICAN GENERAL FINANCE, INC.; ERLINDA GONZALES AND WILSON U. PASCUA, INDIVIDUALLY AND DOING BUSINESS AS HONLAND REALTY,
Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITION FOR WRIT OF CERTIORARI

GARY VICTOR DUBIN
Counsel of Record

FREDERICK J. ARENSMEYER
DUBIN LAW OFFICES
55 Merchant Street, Suite 3100
Honolulu, Hawaii 96813
Telephone: (808) 537-2300
Facsimile: (808) 523-7733
E-Mail: gdubin@dubinlaw.net
Attorneys for Petitioners

QUESTION PRESENTED

Did the Hawaii State Courts violate the Due Process Clause of the United States Constitution by granting foreclosure summary judgments against the real properties of a Husband based upon a United States Bankruptcy Court's In Rem Order in his Wife's Bankruptcy Case, similarly entered in violation of the Due Process Clause of the United States Constitution, voiding the automatic stay in the Husband's subsequent Bankruptcy Case, where in his Wife's Bankruptcy Case he was not a party and had no notice or opportunity to be heard prior to the entry of the Bankruptcy Court's In Rem Order?

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PETITION FOR A WRIT OF CERTIORARI

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this *Petition for a Writ of Certiorari*, timely filed by U.S. Mail on August 19, 2010, within ninety days of the denial of certiorari review by the Supreme Court of the State of Hawaii on May 21, 2010 of the Hawaii Intermediate Court of Appeals affirmation of the decision of the First Circuit Court on the State of Hawaii on December 28, 2009, pursuant to Section 1257(a) of Title 28 of the United States Code and Supreme Court Rules 10(c) and 13(1).

II. AUTHORITATIVE PROVISIONS

The decisions being challenged, as in violation of Section 362 of Tile 11 of the United States Code and the Due Process and Supremacy Clauses of the United States Constitution, are set forth in the Appendix to this Petition.

III. STATEMENT OF THE CASE

This Petition arises from a foreclosure lawsuit in the Circuit Court of the First Circuit of the State of Hawaii, in which the State Circuit Court ordered the foreclosure of mortgages on two real properties known as the "Pearl City Property" and the "Salt Lake Property," each of which were jointly owned by Petitioners Artemio and Gloria Abad, Husband and Wife.

In United States bankruptcy proceedings in which Petitioner Gloria Abad was a party/petitioner, the United States Bankruptcy Court for the District of Hawaii issued an "*in rem*" order affecting her Husband, Petitioner Artemio Abad's interest in the two real properties, subject to a Circuit Court foreclosure action, without having ever afforded him notice of the pendency of those bankruptcy case

proceedings or allowing him an opportunity to be heard or object, upon which order the Circuit Court erroneously relied in confirming the foreclosure sale of those properties over Petitioners' objections.

Petitioners twice moved for relief from the Circuit Court's subsequent foreclosure orders confirming the sales of the two properties, having argued that those orders were void because the Circuit Court originally lacked jurisdiction, pursuant the automatic stay provisions of Section 362 of Tile 11 of the United States Code and the decision of the Hawaii Intermediate Court of Appeals in Island Insurance Co., Inc. v. Santos, 86 Hawaii 363, 949 P.2d 203 (App. 1997), recognizing the Supremacy of the federal automatic stays, to auction the subject properties and to confirm the subject foreclosure sales.

Petitioners maintain that the automatic stay issued in Gloria Abad's bankruptcy case was erroneously lifted "*in rem*" by the Bankruptcy Court, thus affecting Artemio Abad's interests in the subject properties in violation of his due process property rights, and similarly preventing him from himself obtaining a stay of the Circuit Court foreclosure action in his own bankruptcy case.

To the extent that the Bankruptcy Court's order affected Artemio Abad's interest in the subject properties and his ability to himself obtain a separate stay due to the *in rem* nature of that order, Petitioners insist that the Bankruptcy Court lacked jurisdiction to affect Artemio Abad's property rights, and in any event, that its issuance of that *in rem* order violated his due process rights, having deprived him of his interests in the subject real properties without first affording him notice of those proceedings or an opportunity to be heard.

Therefore, Petitioners contend that Artemio Abad was not a person properly before the

Bankruptcy Court in his Wife's proceeding, that the Bankruptcy Court lacked jurisdiction to issue that *in rem* order, and that it nevertheless acted in a manner inconsistent with due process of law. Therefore, the state circuit court and its appointed foreclosure commissioner lacked jurisdiction to sell Petitioners' real properties and/or to confirm those sales, and the Hawaii Intermediate Court of Appeals in affirming the State Circuit Court's legally void orders and judgments gravely erred by dismissing the State Court Appeal.

The proceedings below were summarized by the Hawaii Intermediate Court of Appeals, which affirmed the State Circuit Court, as follows **[comments added]**:

> City Bank filed a complaint to foreclose on the Salt Lake Property against the Abad Defendants, Finance Factors, Defendants/Cross-Claim Defendants/ Appellees the Director of Budget and Fiscal Services of the City and County of Honolulu (the City) and Felix Pascua.
>
> Finance Factors asserted a counterclaim for foreclosure against City Bank and a cross-claim for foreclosure against the Abad Defendants, the City, and Felix Pascua. Finance Factors also asserted a third-party complaint for foreclosure against American General, and Third-Party Defendants Erlinda Gonzales (Gonzales) and Wilson U. Pascua doing business as Honland Realty (Wilson Pascua).
>
> Thereafter, the following events

occurred:

• The circuit court entered the March 4, 2002 Foreclosure Order, granting Finance Factors' motion for default judgment against the Abad Defendants and Felix Pascua, and summary judgment against all other parties on Finance Factors' counterclaim, Finance Factors' cross-claims, and Finance Factors' third-party claims.

• On March 4, 2002, the circuit court entered an HRCP Rule 54(b) certified judgment of foreclosure in favor of Finance Factors and (a) against City Bank on Finance Factors' counterclaim, (b) against the Abad Defendants, the City, and Felix Pascua on Finance Factors' cross-claim, and (c) against American General, Gonzales, and Felix Pascua on Finance Factors' third-party complaint.

• The circuit court entered the June 20, 2002 Foreclosure Order granting City Bank's motion for summary judgment against the Abad Defendants, Finance Factors, the City and Felix Pascua on City Bank's complaint for foreclosure.

• On June 20, 2002, the circuit court entered an HRCP 54(b) certified judgment of foreclosure in favor of City Bank and against the Abad Defendants, Finance Factors, the City, and Felix Pascua as to City Bank's complaint for foreclosure.

[On July 1, 2002, Petitioner Gloria

Abad filed a Petition for Chapter 7 bankruptcy.]

• On August 8, 2002, the United States Bankruptcy Court for the District of Hawai'i (Bankruptcy Court) granted Finance Factors' unopposed motion for relief from the automatic stay caused by the filing of Gloria Abad's bankruptcy petition. This relief from the stay was granted "'in rem' because the Debtor and other persons who claim an interest in the Property have not acted in good faith to reorganize or seek discharge of their debts. . . . As used herein, 'in rem' relief means that the relief from stay is granted not only personally against the Debtor but with respect to the subject property."

[On September 4, 2002 Petitioner Artemio Abad filed his own voluntary Chapter 13 bankruptcy petition.]

• After a motion and hearing, the Bankruptcy Court granted City Bank relief from the automatic stay created by Gloria Abad's petition for bankruptcy. This September 9, 2002 order was also granted "in rem" but applied to the Salt Lake Property only. Notice of this order was served on the Abad Defendants' attorney on September 13, 2002 [after the fact of its entry].

• On October 8, 2002, the foreclosure auction for the Salt Lake Property and the Pearl City Property occurred.

[On October 28, 2002, Petitioner

Artemio Abad's bankruptcy case was dismissed.]

[On November 7, 2002, Petitioners opposed confirmation of the public sales based on the plain fact that the auctions had taken place while Petitioner Artemio Abad's automatic bankruptcy stay was in effect, notwithstanding the Bankruptcy Court's subsequent, so-called *in rem* order, supra, which was entered in Petitioner Gloria Abad's bankruptcy case prospectively, since such *in rem* orders, even if entered retroactively, have been universally ruled to be unconstitutional if applied to persons, including spouses, not parties to an *in rem* proceeding.]

• On November 14, 2002, Gloria Pascua Abad filed a notice of appeal from the June 20, 2002 Foreclosure Order, which the supreme court clerk docketed as supreme court case number 25474.

• On November 14, 2002, the Abad Defendants moved the circuit court to set aside the March 4, 2002 Foreclosure Order pursuant to HRCP 60(b), arguing that the circuit court lacked subject matter jurisdiction based on their claim that the mortgage loan was void as it was made with an unlicensed mortgage broker.

• On December 24, 2002, the circuit court denied the Abad Defendants' HRCP 60(b) motion to set aside the March 4, 2002 Foreclosure Order.

• On January 15, 2003, the Abad Defendants filed a notice of appeal from the December 24, 2002 order denying the Abad Defendants' HRCP 60(b) motion to set aside the March 4, 2002 Foreclosure Order, which the supreme court clerk docketed as supreme court case number 25587.

• On February 12, 2003, the circuit court entered an order and HRCP Rule 52(b) certified judgment confirming the sales of the Salt Lake Property and the Pearl City Property to third-party purchasers and directing the distribution of the sales proceeds.

• On March 14, 2003, the Abad Defendants filed a notice of appeal from the February 12, 2003 order and the February 12, 2003 HRCP 54(b) judgment, which the supreme court clerk docketed as supreme court case number 25693.

• On January 12, 2005, we [Hawaii Intermediate Court of Appeals] issued a published opinion on the consolidated appeals of supreme court case numbers 25474, 25587, and 25693 that dismissed parts of the appeal and affirmed the orders that were the subject of the remaining parts of the appeal. City Bank v. Abad, 106 Hawai'i 406, 105 P.3d 1212 (App. 2005) (Abad I). In this opinion, we

• Dismissed the appeal in number 25474 as untimely,

• Dismissed the appeal in number 25693 as untimely in part and premature in part, and

• In number 25587, dismissed the appeal from the circuit court's November 14, 2002 oral confirmation of the foreclosure sales and affirmed the December 24, 2002 order denying the Abad Defendants' November 14, 2002 HRCP Rule 60(b) motion.

• In so doing, we ruled that the Abad Defendants had not shown the Bankruptcy Court's "in rem" orders lifting the automatic bankruptcy stay as to Finance Factors and City Bank were invalid, either because the Bankruptcy Court "lacked jurisdiction of the parties or otherwise acted in a manner inconsistent with due process of law." Abad I, 106 Hawai'i at 411, P.3d at 1217.

• Central Pacific Bank became City Bank's successor-in-interest in this case as the result of a corporate merger between Central Pacific Bank and City Bank.

On February 21, 2006, the Abad Defendants again moved the circuit court pursuant to HRCP Rule 60(b) to set aside (1) the March 4, 2002 Foreclosure Order, (2) the June 20, 2002 Foreclosure Order, and (3) all subsequent orders and judgments that the circuit court entered pursuant thereto. The circuit court denied this motion by way of its April 25, 2006

> Post-Judgment Order. On May 24, 2006, the Abad Defendants filed a notice of appeal from the April 25, 2006 Post-Judgment order.

See Appendix 3.

The Hawaii Intermediate Court of Appeals dismissed the Petitioners' Appeal on December 28, 2009 Summary Disposition Order, concluding that the appeal was moot because Petitioners had not posted a *supersedeas* bond to stay the State Circuit Court's order confirming the foreclosure sales.

Petitioners had filed with the Hawaii Intermediate Court of Appeals Petitioners Gloria Abad's entire certified record in her Bankruptcy Case No. 02-02358, certified by Mark Van Allsburg, Clerk of the Bankruptcy Court, District of Hawaii, which is available to this Court on PACER, which complete bankruptcy case record irrefutably demonstrates that Petitioner Artemio Abad was never given notice and/or afforded an opportunity to be heard prior to the Bankruptcy Court's entry of its August 8, 2002 and September 9, 2002 *in rem* orders in Gloria's bankruptcy case, which *in rem* orders affected Artemio's interest in his real properties.

IV. LEGAL ARGUMENT

Federal case law interpreting the Due Process and Supremacy Clauses of the United States Constitution, holds that a bankruptcy court's *in rem* order in a bankruptcy proceeding applying to others not parties thereto, especially to other debtors whose bankruptcy cases were filed prior thereto, would clearly be an egregious violation due process and federal bankruptcy rights.

For example, the Bankruptcy Court in Great Western Bank v. Snow, 201 B.K. 968, 971 (Bk. C.D.

Cal. 1996) has explained:

> Due process considerations, however, prohibit the issuance of an order binding the co-owners; the court has no jurisdiction over them, since they have not been brought before the Court.

Id. at 971. *See also*, In re Cherokee New York Investments, 1995 WL 548182 (Bk. E.D.N.Y. 1995).

Indeed, as Petitioners argued to the State Circuit Court in opposing confirmation of the foreclosure sales, some bankruptcy courts have, for instance, expressly embraced the alternative concept of imposing an "equitable servitude" running with the land to get around the otherwise obvious constitutional barrier (which however was not done in Petitioners' bankruptcy cases), recognizing that such *in rem* relief against nonparties by itself is clearly unconstitutional, and even in that event the equitable servitude was still said to bind only *subsequent* takers of title and not spouses already on title as here. Snow v. Great Western Bank, 201 B.R. 968 (C.D. Calif. 1996).

In Snow, for example, that Bankruptcy Court expressly held that an adversary proceeding would be required (which was not done in Petitioners' bankruptcy cases either) against the nonparty spouse before such *in rem* relief, standing alone, would be constitutional. *Id. See also*, In re Chappelle, 2000 Bankr. LEXIS 1910 (D.C. 2000); In re Yimam, 214 B.R. 463 (Md. 1997), both courts holding that *in rem* orders can constitutionally operate only to bar "subsequent purchasers" and not previous title holders, such as a debtor's current spouse, as here.

The reason for denying blanket *in rem* relief,

to further emphasize the obvious, is because if a court were to thus affect the rights of persons not properly before it, procedural due process of law would be grossly and abusively violated. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Bank of Martin v. England, 385 U.S. 99, 102 (1966). That bedrock procedural due process concept is nothing new.

The leading federal cases in consumer procedural due process of law are well known: Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (striking down a state statute permitting the garnishment of wages without notice and opportunity for hearing); Fuentes v. Shevin, 407 U.S. 67 (1972) (striking down two state replevin statutes allowing repossession without notice or hearing); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 49 U.S. 601 (1975) (striking down a state garnishment statute allowing impounding without notice or an opportunity for early hearing).

More recently, in United States v. James Daniel Good Real Property, 519 U.S. 43, 53 (1993), this Court took another opportunity, this time with respect to civil forfeiture laws, to reaffirm the Sniadach-Fuentes-North Georgia line of cases, holding that "the right to prior notice and a hearing is central to the Constitution's command of due process . . . 'to protect . . . use and possession of property from arbitrary encroachment – to minimize deprivation of property'".

Hawaii has also been a leader in the preservation of procedural due process rights, Hawaii's appellate courts having repeatedly, whether reversing or otherwise, continually reaffirming the due process requirements of notice and hearing in numerous cases brought before our appellate courts in recent years in virtually every

conceivable context, KNG Corporation v. Kim, 107 Hawaii 73, 80, 82, 110 P.3d 397, *reconsideration denied*, 107 Haw. 348, 113 P.3d 799 (2005) (holding that notice and an opportunity to be heard are "the basic elements of procedural due process of law," in the context of the imposition of a rent trust fund); Bank of Hawaii v. Kunimoto, 91 Hawaii 372, 388, 984 P.2d 1198 (1999) (holding that a criticized *pro hac vice* attorney had a right to notice and a hearing); State v. Christian, 88 Hawaii 407, 424, 967 P.2d 239 (1998) (holding that a criminal Appellant must be given notice and a reasonable opportunity to defend); Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Hawaii 217, 243, 953 P.2d 1315 (1998) (reaffirming notice and the right to be heard in a height variance dispute, otherwise finding harmless error); Kerman v. Tanaka, 75 Haw. 1, 22, 27-28, 856 P.2d 1207, *cert. denied*, 510 U.S. 1119 (1993) (upholding an administrative revocation of driver's license where notice and opportunity to be heard were protected); Evans v. Takao, 74 Haw. 267, 282-283, 842 P.2d 255 (1992) (holding that notice and an opportunity to be heard are required in contempt proceedings); Sandy Beach Defense Fund v. City Council of City and County of Honolulu, 70 Haw. 261, 378, 773 P.2d 250 (1989) (holding that use permits require notice and opportunity to be heard, otherwise finding no due process violation); In re Smith, 68 Haw. 466, 471, 719 P.2d 397 (1986) (holding that the Hawaiian Homes Commission writ-of-assistance lease cancellation and seizure violated due process because of lack of notice and a hearing).

All actions taken by a State Court against a debtor's property after a bankruptcy petition is filed are considered to be null and void, Schwartz v. United States, 954 F.2d 569, 571 (9th Cir. 1992) ("Given the importance and fundamental purpose of the automatic stay, and the broad debtor protections of the Bankruptcy Code, we find that Congress

intended violations of the automatic stay to be void rather than voidable."). See also, Executive Square Office Building v. O'Connor and Associates, Inc., 19 B.R. 143, 147 (N.D. Fla. 1981); cf. Waimanalo Village Residents' Corporation v. Young, 87 Hawaii 353, 956 P.2d 1285 (App. 1998).

The State Circuit Court nevertheless disregarded such clear controlling precedent, and erroneously denied Petitioners' requested Rule 60(b)(4) relief, having originally lacked jurisdiction pursuant the automatic stay provisions of Section 362 of Tile 11 of the United States Code to auction the subject properties and to confirm the subject foreclosure sales.

Worse, on appeal, the Hawaii Intermediate Court of Appeals completely ignored such sensitive due process and federal supremacy issues, stating simply without any relevant legal analysis that Petitioners "did not show that the Bankruptcy Court's order lifting its stay over the properties in question was invalid." Appendix 3, at 8.

However, not only was the Bankruptcy Court's *in rem* order invalid against Petitioner Artemio Abad as a matter of law, but the record in this case completely satisfies the ICA's earlier evidentiary concerns explained in Abad 1:

> The record of this case, however, does not contain the factual basis necessary to support the legal argument. Nothing in the record of this case shows that Artemio was not a person "properly before" the bankruptcy court in Gloria's bankruptcy case or that he lacked notice and an opportunity to be heard prior to the bankruptcy court's entry of its August 8, 2002 and September 9,

2002 orders in Gloria's bankruptcy case.

Abad I, 106 Hawaii at 412, 105 P.3d at 1218.

The complete certified record of Petitioner Gloria Abad's bankruptcy case, which was filed in conjunction with Petitioners Rule 60(b) motion irrefutably demonstrates that Artemio Abad was not a person properly before the Bankruptcy Court, and that he was never afforded notice and an opportunity to be heard.

Thus, the ICA's December 28, 2009 Summary Disposition Order is clearly and gravely erroneous, yet the Hawaii Supreme Court refused review.

V. CONCLUSION

For all of the foregoing reasons, the Petition should be granted pursuant to the Due Process and Supremacy Clauses of the United States Constitution.

Respectfully submitted,

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
Counsel of Record

FREDERICK J. ARENSMEYER
Attorneys for Petitioner

Honolulu, Hawaii
August 19, 2010

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APPENDIX

1. **Order Granting Movant and Secured Creditor City Bank's Motion for Relief from the Automatic Stay Filed September 9, 2002**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re	Case No. 02-02358
	(Chapter 7)
GLORIA P. ABAD,	
	ORDER GRANTING
Debtor.	MOVANT AND
	SECURED CREDIT CITY
	BANK'S MOTION FOR
	RELIEF FROM THE
	AUTOMATIC STAY;
	EXHIBIT "A"
	Hearing
	Date: August 21, 2002
	Time: 1:30 p.m.
	Judge: The Honorable
	Robert J. Farris

ORDER GRANTING MOVANT AND SECURED CREDITOR CITY BANK'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY; EXHIBIT "A"

Movant and Secured Creditor CITY BANK filed its Motion for Relief from Automatic Stay (hereinafter "Motion") herein on July 19, 2002. The Motion came on for hearing on August 14, 2002 at 1:30 p.m. and was continued to August 21, 2002 at 1:30 p.m. At the continued hearing, Peter Aduja, Esq. appeared on behalf of Debtor Gloria P. Abad and Mitzi A. Lee, Esq. appeared on behalf of City Bank.

The Court has heard the arguments of counsel and has carefully considered the Motion, the Notice of Hearing, the Memorandum in Support of the Motion, the Declaration of Ed Castro, the Declaration of Mitzi A. Lee, Debtor Gloria Abad's Opposition and all other relevant documents contained in the file herein, and based upon such consideration, it is hereby ORDERED THAT:

The aforesaid Motion is granted, and the automatic stay of 11 U.S.C. 362(a) as imposed against City Bank with respect to the Debtor, Debtor's Estate, and that certain real property located at 3345 Ala Akulikuli Street, Honolulu, Hawaii 96818 (hereinafter "Property"), of which a copy of the description of the Property is attached hereto as Exhibit "A", and made a part hereof, is terminated as of September 4, 2002; and

Further, that as of September 4, 2002, City Bank, its attorneys, its agents, any foreclosure commissioner or successor commissioner can proceed to exercise any and all of their rights and remedies with respect to the Property, including but not limited to, foreclosure of City Bank's Mortgage against the Property and recovery of possession of said Property.

IT IS FURTHER HEREBY ORDERD, ADJUDGED AND DECREED that the relief is being granted "in rem" because the Debtor and other persons who claim an interest in the Property have not acted in good faith to reorganize or seek discharge of their debts under the Bankruptcy Code but, rather have used the filing of a bankruptcy case as an obstruction to a lender's efforts to foreclose on mortgaged property. As used herein, "in rem" relief

means that the relied from stay is granted not only personally against Debtor but with respect to the Property; and shall be deemed binding and of full force and effect in any subsequent bankruptcy case, whether commenced by a debtor in this case or any another individual or entity claiming an interest in the Property. This in rem relief shall be effective only until the earlier of (i) 240 days after the date of entry of this order, or (ii) the recovery of possession by a purchaser at a judicial or non-judicial sale upon foreclosure of the subject mortgage.

It is hereby ordered that City Bank may not obtain a deficiency judgment without further order of this Court.

DATED: Honolulu, Hawaii, September 9, 2002.

/S/ ROBERT J. FARIS
Judge of the Above-Entitled Court

2. **Order Denying the Abad Defendant's Rule 606(b)Motion to Set Aside Filed April 25, 2006**

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT [OF THE] STATE OF HAWAII

CITY BANK, Plaintiff, vs. ARTEMIO MARCOS ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE ARTEMIO M. ABAD REVOCABLE TRUST; GLORIA PASCUA ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE GLORIA P. ABAD REVOCABLE TRUST; JENNIFER ABAD,; FELIX PASCUA; FINANCE FACTORS, LIMITED; DIRECTOR OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF HONOLULU; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE "NON-PROFIT" CORPORATIONS 1-50; and DOE GOVERNMENTAL UNITS 1-50, Defendants,	) CIVIL NO. 01-1-0995-03) (Foreclosure))) ORDER DENYING THE ABAD DEFENDANTS' RULE 606(b)(4) MOTION TO SET ASIDE: (1) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANT AND THIRD-PARTY PLAINTIFF FINANCE FACTORS, LIMITED'S MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANTS ARTEMIO MARCOS ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE ARTEMIO M. ABAD REVOCABLE TRUST, GLORIA P. ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE GLORIA PASCUA ABAD REVOCABLE TRUST, JENNIFER ABAD AND FELIX PASCUA AND SUMMARY JUDGMENT AS TO ALL OTHER

and	) PARTIES AND FOR
	) INTERLOCUTORY
FINANCE FACTORS, LIMITED,	) DECREE OF FORECLOSURE AS TO
	) ALL CLAIMS AND ALL
Third-Party Plaintiff,	) PARTIES FILED ON MAY 24, 2001, FILED
	) ON MARCH 4, 2002,
vs.	) AND
	) (2) FINDINGS OF FACT,
AMERICAN GENERAL FINANCE, INC., ERLINDA GONZALES and WILSON U. PASCUA, Individually and doing business AS HONLAND REALTY,	) CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS AND AGAINST ALL PARTIES,
Third-Party Defendants.	) INTERLOCUTORY DECREE OF FORECLOSURE AND ORDER OF SALE, FILED FEBRUARY 6, 2002, AND
	) (3) ALL SUBSEQUENT ORDERS, JUDGMENTS, COMMISSIONER'S DEEDS, TITLE TRANSFERS, AND WRITS IN THIS ACTION ENTERED PURSUANT THERETO
	)
	) Hearing
	) Date: March 14, 2006
	) Time: 9:30 a.m.
	) Judge: Hon. Karen N. Blondin

ORDER DENYING THE ABAD DEFENDANT'S RULE 60(b)(4) MOTION TO SET ASIDE1) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANT AND THIRD-PARTY PLAINTIFF FINANCE FACTORS, LIMITED'S MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANTS ARTEMIO MARCOS ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE ARTEMIO M. ABAD REVOCABLE TRUST, GLORIA P. ABAD,INDIVIDUALLY AND AS TRUSTEE OF THE GLORIA PASCUA ABAD REVOCABLE TRUST, JENNIFER ABAD AND FELIX PASCUA AND SUMMARY JUDGMENT AS TO ALL OTHER PARTIES AND FOR INTERLOCUTORY DECREE OF FORECLOSURE AS TO ALL CLAIMS AND ALL PARTIES FILED ON MAY 24, 2001, FILED ON MARCH 4, 2002, AND (2) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS AND AGAINST ALL PARTIES, INTERLOCUTORY DECREE OF FORECLOSURE AND ORDER OF SALE, FILED FEBRUARY 6, 2002, AND 3) ALL SUBSEQUENT ORDERS, JUDGMENTS, COMMISSIONER'S DEEDS, TITLE TRANSFERS, AND WRITS IN THIS ACTION ENTERED PURSUANT THERETO

The Abad Defendants' Rule 60(b)(4) Motion to Set Aside: (1) Findings of Fact, Conclusions of Law and Order granting Defendant and Third-Party Plaintiff Finance Factors, Limited's Motion for Default Judgment against Defendant's Artemio Marcos Abad, Individually and as Trustee of the Artemio M. Abad Revocable Trust, Gloria P. Abad, Individually and as Trustee of the Gloria Pascua Abad Revocable Trust, Jennifer Abad and Felix Pascua and Summary Judgment as to all Other Parties and for Interlocutory Decree of Foreclosure as to all Claims and all Parties filed on May 24, 2001, filed on March 4, 2002 and (2) Findings of

Fact, Conclusions of Law and Order Granting Plaintiff's Motion for Summary Judgment on all claims and against all Parties, Interlocutory Decree of Foreclosure and Order of Sale, filed February 6,2002, and (3) Al Subsequent Orders, Judgments, Commissioner's Deeds, Title Transfers, and Writs in this Action Entered Pursuant Thereto, filed herein on February 21, 2001 (hereinafter "Motion to Set Aside") came on for hearing before this Honorable Court on March 14, 2006 at 9:30 a.m. Mitzi A. Lee appeared on behalf of Plaintiff Central Pacific Bank, successor by merger to City Bank, Paul B.K. Wong appeared on behalf of Defendant Finance Factors, Limited; and Gary Victory Dubin appeared on behalf of the Abad Defendants.

Having heard the arguments of counsel, and having reviewed the Motion to Set Aside, the opposition thereto and the files and pleadings herein and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion to Set Aside is hereby DENIED.

DATED: Honolulu, Hawaii, April 25, 2006.

/S/ KAREN N. BLONDIN
Judge of the Above-Entitled Court

3. Hawaii Intermediate Court of Appeals Summary Disposition Order, Dated December 28, 2009

No. 27953

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

CITY BANK,
Plaintiff/Counterclaim Defendant/Appellee,

v.

ARTEMTIO MARCOS ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE ARTEMIO M. ABAD REVOCABLE TRUST; GLORIA PASCUA ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE GLORIA P. ABAD, REVOCABLE TRUST; JENNIFER ABAD, Defendants/Cross-Claim Defendants/Appellants, and FINANCE FACTORS, LIMITED, Defendant/Cross-claimant/Counterclaimant/Appellee; DIRECTOR OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF HONOLULU, Defendants/Cross-Claim Defendants/Appellees; and FELIX PASCUA; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS, DOE "NON-PROFIT" CORPORATIONS 1-10, and GOVERNMENTAL UNITS 1-10, Defendants; and FINANCE FACTORS, LIMITED, Thirf-Party Plaintiff-Appellee, v. AMERICAN GENERAL FINANCE, INC., Third-Party Defendant-Appellee, and ERLINDA GONZALES and WILSON U. PASCUA, individually and doing business as HONLAND REALTY, Third-Party Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 01-1-0995)

SUMMARY DISPOSITION ORDER
(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

In this appeal from a post-judgment proceeding in a foreclosure lawsuit, Defendants/Cross-Claim Defendants/Appellants Artemio Marcos Abad, Gloria Pascua Abad and Jennifer Abad (the Abad Defendants) appeal from the April 25, 2006 "Order Denying the Abad Defendants' Rule 60 (b)(4) Motion to Set Aside: (1)Findings of Fact, Conclusions of Law and Order Granting Defendant and Third Party Plaintiff Finance Factors, Limited's Motion for Default Judgment Against Defendants Artemio Marcos Abad, Individually and as Trustee of the Artemio M. Abad Revocable Trust, Gloria P. Abad. Individually and as Trustee of the Gloria Pascua Abad Revocable Trust, Jennifer Abad and Felix Pascua and Summary Judgment as to All Other Parties and for Interlocutory Decree of Foreclosure as to All Claims and All Parties Filed on May 24, 2001, Filed on March 4, 2002,[1] (2) Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for Summary Judgment on All Claims and Against All Parties, Interlocutory Decree of Foreclosure and Order of Sale, Filed February 6, 2002,[2] and (3) All Subsequent Orders, Judgments, Commissioner's Deeds, Title Transfers, and Writs in this Action Entered Pursuant Thereto" (the April 25,

[1] Hereinafter referred to as the "March 4, 2002 Foreclosure Order."

[2] This order was filed on June 20, 2002 and is hereinafter referred to as "the June 20, 2002 Foreclosure Order."

2006 Post-Judgment Order) entered by the Circuit Court of the First Circuit (circuit court).[3]

The Abad Defendants argue on appeal that the circuit court erred

> in denying [Hawai'i Rules of Civil Procedure (HRCP)] Rule 60 (b)(4) relief as it originally lacked jurisdiction, pursuant [to] the automatic stay provisions of Section 362 of Tile [sic] 11 of the United States Code and the decision of the Intermediate Court of Appeals held in Island Insurance Co., Inc. v. Santos, 86 [Hawai'i], 363, 949 P.2d 203 (App. 1997), to auction the subject properties and to confirm the subject foreclosure sales.

BACKGROUND

In order to purchase real estate in Pearl City[4] (the Pearl City Property) and Salt Lake[5] (the Salt Lake Property), the Abad Defendants obtained loans from City Bank Defendant/Cross-claimant/Counterclaimant/Third-Party Plaintiff/Appellee Finance Factors, Limited (Finance Factors), and Third-Party Defendant/Appellee American General Finance, Inc. (American General). The Abad Defendants mortgage the Pearl City Property and the Salt Lake Property to Finance Factors. The Abad Defendants additionally mortgaged the Sale Lake Property to City Bank. The Abad Defendants additionally mortgaged the Pearl City Property to

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[3] The Honorable Karen N. Blondin presided.

[4] This property is located at 98-1457 Ho'omāhie Loop, Pearl City, Hawai'i.

[5] This property is located at 3345 'Āla Akulikuli Street, Honolulu, Hawai'i.

American General. The Abad Defendants eventually defaulted on some of the loans.

City Bank filed a complaint to foreclose on the Salt Lake Property against the Abad Defendants, Finance Factors, Defendants/Cross-Claim Defendants/Appellees the Director of Budget and Fiscal Services of the City and County of Honolulu (the City) and Felix Pascua.

Finance Factors asserted a counterclaim for foreclosure against City Bank and a cross-claim for foreclosure against the Abad Defendants, the City, and Felix Pascua. Finance Factors also asserted a third-party complaint for foreclosure against American General, and Third-Party Defendants Erlinda Gonzales (Gonzales) and Wilson U. Pascua doing business as Honland Realty (Wilson Pascua).

Thereafter, the following events occurred:

- The circuit court entered the March 4, 2002 Foreclosure Order, granting Finance Factor's motion for default judgment against the Abad Defendants and Felix Pascua, and summary judgment against all other parties on Finance Factor's counterclaim, Finance Factor's cross-claims, and Finance Factor's third-party claims.

- On March 4, 2002, the circuit court entered an HRCP Rule 54(b) certified judgment of foreclosure in favor of Finance Factors and (a) against City Bank on Finance Factors's counterclaim, (b) against the Abad Defendants, the City, and Felix Pascua on Finance Factors' cross-claim, and (c) against American General, Gonzales, and Felix Pascua on Finance Factor's third-party complaint.

• The circuit court entered the June 20, 2002 Foreclosure Order granting City Bank's motion for summary judgment against the Abad Defendants, Finance Factors, the City and Felix Pascua on City Bank's complaint for foreclosure.

• On June 20, 2002, the circuit court entered an HRCP 54(b) certified judgment of foreclosure in favor of City Bank and against the Abad Defendants, Finance Factors, the City, and Felix Pascua as to City Bank's complaint for foreclosure.

• On August 8, 2002, the United States Bankruptcy Court for the District of Hawai'i (Bankruptcy Court) granted Finance Factor's unopposed motion for relief from the automatic stay caused by the filing of Gloria Abad's bankruptcy petition. This relief from the stay was granted "'in rem' because the Debtor and other persons who claim an interest in the Property have not acted in good faith to reorganize or seek discharge of their debts. . . . As used herein, 'in rem' relief means that the relief from stay is granted not only personally against the Debtor but with respect to the subject property."

• After a motion and hearing, the Bankruptcy Court granted City Bank relief from the automatic stay created by Gloria Abad's petition for bankruptcy. This September 9, 2002 order was also granted "in rem" but applied to the Salt Lake Property only. Notice of this order was served on the Abad Defendants' attorney on September 13, 2002.

• On October 8, 2002, the foreclosure auction for the Salt Lake Property and the Pearl City Property occurred.

• On November 14, 2002, Gloria Pascua Abad filed a notice of appeal from the June 20, 2002 Foreclosure Order, which the supreme court clerk docketed as supreme court case number 25474.

• On November 14, 2002, the Abad Defendants moved the circuit court to set aside the March 4, 2002 Foreclosure Order pursuant to HRCP 60(b), arguing that the circuit court lacked subject matter jurisdiction based on their claim that the mortgage loan was void as it was made with an unlicensed mortgage broker.

• On December 24, 2002, the circuit court denied the Abad Defendants' HRCP 60(b) motion to set aside the March 4, 2002 Foreclosure Order.

• On January 15, 2003, the Abad Defendants filed a notice of appeal from the December 24, 2002 order denying the Abad Defendants' HRCP 60(b) motion to set aside the March 4, 2002 Foreclosure Order, which the supreme court clerk docketed as supreme court case number 25587.

• On February 12, 2003, the circuit court entered an order and HRCP Rule 52(b)-certified judgment confirming the sales of the Salt Lake Property and the Pearl City Property to third-party purchasers and directing the distribution of the sales proceeds.

• On March 14, 2003, the Abad Defendants filed a notice of appeal from the February 12, 2003 order and the February 12, 2003 HRCP 54(b) judgment, which the supreme court clerk docketed as supreme court case number 25693.

• On January 12, 2005, we issued a published opinion on the consolidated appeals of supreme court case numbers 25474, 25587, and 25693 that

dismissed parts of the appeal and affirmed the orders that were the subject of the remaining parts of the appeal. City Bank v. Abad, 106 Hawai'i 406, 105 P.3d 1212 (App. 2005) (Abad I). In this opinion, we

- Dismissed the appeal in number 25474 as untimely,

- Dismissed the appeal in number 25693 as untimely in part and premature in part, and

- In number 25587, dismissed the appeal from the circuit court's November 14, 2002 oral confirmation of the foreclosure sales and affirmed the December 24, 2002 order denying the Abad Defendants' November 14, 2002 HRCP Rule 60(b) motion.

In so doing, we ruled that the Abad Defendants had not shown the Bankruptcy Court's "in rem" orders lifting the automatic bankruptcy stay as to Finance Factors and City Bank were invalid, either because the Bankruptcy Court "lacked jurisdiction of the parties or otherwise acted in a manner inconsistent with due process of law." Abad I, 106 Hawai'i at 411, P.3d at 1217.[6]

- Central Pacific Bank became City Bank's successor-in-interest in this case as the result of a corporate merger between Central Pacific Bank and City Bank.

On February 21, 2006, the Abad Defendants again moved the circuit court pursuant to HRCP Rule 60(b) to set aside (1) the March 4, 2002

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[6] A copy of the ICA's prior published opinion in Abad I, 106 Hawaii 406, P.3d 1212, is attached to Appendix 1 as Exhibit "B".

Foreclosure Order, (2) the June 20, 2002 Foreclosure Order, and (3) all subsequent orders and judgments that the circuit court entered pursuant thereto. The circuit court denied this motion by way of its April 25, 2006 Post-Judgment Order.[7] On May 24, 2006, the Abad Defendants filed a notice of appeal from the April 25, 2006 Post-Judgment order.

JURISDICTION

Before we consider the merits of this appeal, we must decide whether we have jurisdiction to consider this matter. "An appellate court has . . . an independent obligation to ensure jurisdiction over each case to dismiss the appeal sua sponte if a jurisdictional defect exits." State v. Graybeard, 93 Hawai'i 513, 516, 6 P.3d 385, 388 (Ap. 2000).

This is an appeal from a post-judgment order. Hawaii Revised Statutes (HRS) § 641-1(a) (Supp. 2005) authorizes appeals from final judgments, orders or decrees. "A post-judgment order is an appealable final order under HRS § 641-1(a) if the order ends the proceedings, leaving nothing further to be accomplished." Ditto v. McCurdy, 103 Hawai'i 153, 157, 80 P.3d 975, 978 (2003). Although, for the purpose of appealability, a separate judgment is usually necessary under HRCP Rule 58 and the holding in Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338, (1994), "the separate judgment requirement articulated in Jenkins is inappropriate in the post-

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[7] The Circuit Court's April 25, 2006 Order denying Petitioners' Rule 60(b) motion, located in the Record on Appeal, Volume 7 at 130-33, is attached to Appendix 1 hereto as Exhibit "C".

judgment context." Ditto, 103 Hawai'i at 158, 80 P.3d at 979.

Accordingly, we initially appear to have jurisdiction over this appeal pursuant to HRS § 641-1(a).

However,

A case is moot if it has lost its character as a present, live controversy of the kind that must exist if courts are to avoid advisory opinions on abstract propositions of law. The rule is one of the prudential rules of judicial self-governance founded in concern about the proper - -and properly limited – role of the courts in a democratic society. We have said the suit must remain alive throughout the course of litigation to the moment of final appellate disposition to escape the mootness bar . . . . Simply put, a case is moot if the reviewing court can no longer grant effective relief.

Kaho'ohanohano v. State. 114 Hawai'i 302, 332, 162 P.3d 696, 726 (2007) (emphasis removed, citations, internal quotation marks, and brackets omitted, and format altered).

Thus, for example, in an appeal from a foreclosure case, the defendants failure to stay the effect of an order confirming a foreclosure sale of property to a third-party, which apparently was a good faith purchaser, rendered moot the defendants' appeal from the order confirming the sale. City Bank v. Saje Ventures II, 7 Haw. App. 130, 132, 748 P.2d 812, 814 (1988). In support of the decision, we relied on the general rule that "the right of a good faith purchaser to receive property acquired at a judicial sale cannot be affected by the reversal of an

order ratifying the sale where a supersedeas bond has not been filed." Id. at 133, 748 P.2d at 814 (internal quotation marks and citation omitted).

Since the Saje Defendants did not stay the effect of the confirmation order and since there has been a closing of the sale of the Property to Outrigger which cannot be undone under the facts and the law, we cannot grant the relief sought by the Saje Defendants. Therefore, the appeal is moot and must be dismissed.

Id. at 132, 748 P.2d at 814.

In the instant case, the Abad Defendants did not file a supersedeas bond and obtain a court order staying the February 12, 2003 judgment confirming the foreclosure sales. Like the Debtor in City Bank v. Saje Ventures II, the Abad Defendants ask this court to reverse the April 25, 2006 Post-Judgment Order, although they did not file a supersedeas bond and obtain a court order staying the February 6, 2003 order and judgment confirming the foreclosure sale.

Granted, "[a]n exception to the rule is where the reversal is based on jurisdictional grounds[,]" and the Abad Defendants are arguing that the circuit court lacked jurisdiction to enter the February 12, 2003 order and judgment confirming the foreclosure sale. Nevertheless, an examination of the Abad Defendant's prior appeal and our decision in Abad I, shows that the Abad Defendants were raising the same jurisdiction argument that was rejected by this court in Abad I. In Abad I, this court held that the Abad Defendants failed to carry their burden on appeal, that is to say, did not show that the Bankruptcy Court's order lifting its stay over the

properties in question was invalid and thus rejected the Abad Defendants' argument that the circuit court lacked jurisdiction to confirm the sales of the properties in this case.

It is true that the Supreme Court of Hawai'i has explicitly recognized three exceptions to the mootness doctrine:

> (1) the "capable of repetition, yet evading review" exception (the CRER exception);
> (2) the public interest exception; and
> (3) the collateral consequences exception.

Hamilton Ex Rel Lethem v. Lethem, 119 Hawai'i 1, 5-10, 193 P.3d 839, 843-48 (2008). However, one of these exceptions applies to the instant case.

With regard to the CRER exception:,

> [t]he phrase, "capable of repetition, yet evading review," means that a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit.

Lethem, 119 Hawai'i at 5, 193 P.3d at 843 (citation and some internal quotation marks omitted). The CRER exception to the mootness doctrine does not appear to apply to the instant case because the instant case would not evade review but for the fact that the Abad Defendants chose not to file a supersedeas bond. Therefore, the CRER exception to the mootness doctrine does not apply to the instant case.

With regard to the public interest exception, the Supreme Court of Hawai'i has explained that, "[w]hen analyzing the public interest exception, this court looks to (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for future guidance of public officers, and (3) the likelihood of future recurrence of the question." Lethem, 119 Hawai'i at 6-7, 193 P.3d at 844-45 (citation, internal quotation mark, and brackets omitted). The public interest exception to the mootness doctrine does not appear to apply to the instant case because (1) foreclosure case arises out of a private contract between parties that does not involve the government, and, thus, foreclosure is more of a dispute of a private nature rather than a public nature, (2) an authoritative determination for future guidance already exists within the holding in Saje Ventures II, 7 Haw. App. At 132, 748 P.2d at 814, and (3) the questions within the instant case will recur only when parties choose not to file a supersedeas bond to stay the circuit court's ruling pending appeal. Therefore, the public interest exception to the mootness doctrine does not appear to apply to the instant case.

With regard to the collateral consequences exception, the Supreme Court of Hawai'i has "adopted the collateral consequences to the mootness doctrine in cases involving domestic violence TROs where there is a reasonable possibility that prejudicial collateral consequences will occur as a result of the entry of the TRO." Lethem, 119 Hawai'i at 9-10,193 P.3d at 847-48 (internal quotation marks omitted). The collateral consequences exception to the mootness doctrine does not apply to the instant case because the instant case does not involve

domestic violence or a temporary restraining order. Furthermore, the Abad Defendants could have avoided any prejudicial collateral consequences if they filed a supersedeas bond to stay the circuit court's ruling pending this appeal. Therefore, the collateral consequences exception to the mootness doctrine does not apply to the instant case.

Our disposition makes in unnecessary to reach the Abad Defendants' other arguments on appeal.

CONCLUSION

Therefore, this appeal from the April 25, 2006 Post-Judgment Order of the Circuit Court of the First Circuit is hereby dismissed.

DATED: Honolulu, Hawai'i, December 28, 2009.

4. **Hawaii Supreme Court of the State of Hawaii Order Rejecting Application for Writ of Certiorari, Filed May 21, 2010**

NO. 27953

IN THE SUPREME COURT
OF THE STATE OF HAWAII

CITY BANK,
Respondent/Plaintiff/Counterclaim-Defendant
Appellee,

vs.

ARTEMIO MARCOS ABA, INDIVIDUALLY AND AS TRUSTEE OF THE ARTEMIO M. ABAD REVOCABLE TRUST; GLORIA PASCUA ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE GLORIA P. ABAD REVOCABLE TRUST; JENNIFER ABAD,
Petitioners/Defendants/Cross-Claim
Defendants/Appellants,

and

FINANCE FACTORS, LIMITED,
Respondent/Defendant/Cross-
claimant/Counterclaimant/Appellee,

and

DIRECTOR OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF HONOLULU,

Respondents/Defendants/Cross-Claim
Defendants/Appellees;

FELIX PASCUA; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS, DOE "NON-PROFIT"

CORPORATIONS 1-10, and DOE GOVERNMENTAL UNITS 1-50, Defendants;

and

FINANCE FACTORS, LIMITED, Third-Party Plaintiff-Appellee,

vs.

AMERICAN GENERAL FINANCE, INC., Third-Party Defendant-Appellee,

and

ERLINDA GONZALES and WILSON U. PASCUA, individually and doing business as HONLAND REALTY, Third-Party Defendants.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CIV. NO. 01-1-0995)

ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI

(By: Nakayama, J., for the court)

Petitioners' application for writ of certiorari filed on April 14, 2010, is hereby rejected.

DATED: Honolulu, Hawai'i, May 21, 2010.

FOR THE COURT:

/S/ PAULA C. NAKAYAMA
Associate Justice

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(2)

No. 10-293

Supreme Court, U.S.
FILED
SEP 29 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ARTEMIO MARCOS ABAD, Individually and as Trustee of the Artemio M. Abad Revocable Trust; GLORIA PASCUA ABAD, Individually and as Trustee of the Gloria P. Abad Revocable Trust,

Petitioners,

vs.

FINANCE FACTORS, LIMITED; CENTRAL PACIFIC BANK, Successor-In-Interest to City Bank; DIRECTOR OF BUDGET AND FISCAL SERVICES, City and County of Honolulu; AMERICAN GENERAL FINANCE, INC.; ERLINDA GONZALES and WILSON U. PASCUA, Individually and doing business as Honland Realty,

Respondents.

On Petition For Writ Of Certiorari To The Intermediate Court Of Appeals Of Hawaii

CENTRAL PACIFIC BANK'S, SUCCESSOR-IN-INTEREST TO CITY BANK, OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MITZI A. LEE
Counsel of Record

LAW OFFICE OF MITZI LEE
212 Merchant Street, Suite 227
Honolulu, Hawaii 96813
Telephone: 808-275-0200
Facsimile: 808-275-0222
e-mail: mitzi.lee@hawaiiantel.net
Attorney for Respondent
Central Pacific Bank, Successor-In-Interest to City Bank

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Question Presented should be:

> Did the Hawaii State Courts violate the Due Process Clause of the United States Constitution by granting foreclosure summary judgments against the real properties owned by a husband and wife based upon a United States Bankruptcy Court's In Rem Orders in the wife's bankruptcy case where the United States Bankruptcy Court specifically noted in the In Rem Orders that "the Debtor and other persons who claim an interest in the Property have not acted in good faith to reorganize or seek discharge of their debts under the Bankruptcy Code but, rather have used the filing of a bankruptcy case as an obstruction to a lender's efforts to foreclose on mortgaged property?"

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CENTRAL PACIFIC BANK'S, SUCCESSOR-IN-INTEREST TO CITY BANK, OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

RESPONDENT CENTRAL PACIFIC BANK, Successor-In-Interest to City Bank (hereinafter "Respondent CPB"), objects to the arguments set forth by Petitioners in the Statement of Case section of the Petition for Writ of Certiorari filed on August 19, 2010 and placed on the docket on August 30, 2010. Respondent CPB does not object to the factual portion of the Statement of the Case set forth by Petitioners other than to incorporate the following which Petitioners conveniently omitted.

The following bankruptcy petitions were filed by the Plaintiffs during the foreclosure action, which was initiated by Respondent CPB in the Circuit Court of the First Circuit of the State of Hawaii:

Debtor	Case No.	Chapter	Date Filed	Date Closed
Gloria P. Abad	1:01-BK-02461	7	06/20/01	09/25/01
Artemio M. Abad	1:01-BK-03144	13	08/07/01	10/12/01
Jennifer Ann Abad	1:01-BK-03867	13	10/02/01	11/30/01
Jennifer Ann Abad	1:01-BK-04564	7	11/21/01	12/28/01
Gloria P. Abad	1:02-BK-02358	7	07/01/02	10/16/02
Artemio M. Abad	1:02-BK-03188	7	09/04/02	11/20/02[1]

[1] Said information was obtained through PACER Case Locator. A copy of the print-outs are attached as Appendix A.

II. REASONS FOR DENYING THE WRIT OF CERTIORARI

Contrary to Petitioners' argument, federal law has held that *in rem* orders in a bankruptcy proceeding which apply to property co-owned by others who are not parties to the bankruptcy proceeding are not a violation of due process where, as in the instant case, there have been serial bankruptcy filings and where the Debtor and others who claim an interest in the property have not acted in good faith under the Bankruptcy Code. *In re Roben*, 294 B.R. 840 (E.D. Ar. 2003); *In re Fernandez*, 212 B.R. 361, 371 (C.D. Cal. 1997); *In re Yiman*, 214 B.R. 463, 466-67 (D.Md. 1997). Moreover, federal law has specifically held that actions of a Debtor and her husband can be imputed to each other. *In re Ouverson*, 79 B.R. 830 (N.D. Iowa 1987); *In re Kinney*, 51 B.R. 840 (C.D. Cal. 1985). Additionally, it is undisputed that the *In Rem* Order in the instant case was provided to Artemio Abad's counsel on September 12, 2002 and the auction for the subject property did not take place until October 8, 2002. Federal law has held that an attorney is the agent for his or her client. The basic laws of agency dictate that an agent's knowledge is imputed to his or her principal. There is a presumption that an agent will relay to his or her principal any and all relevant information that he or she has acquired. *Veal v. Geraci*, 23 F.3d 722 (2nd Cir. 1994); *Novak v. TRW, Inc.*, 822 F.Supp. 963, 974 (E.D.N.Y. 1993); *In re Felberman*, 196 B.R. 678 (S.D.N.Y. 1995). Hence, Artemio Abad had ample time to challenge the *In*

Rem Order prior to the auction if he so chose, but he did not do so. Instead, the subject properties were sold to third-party bona fide purchasers rendering Petitioners' Writ of Certiorari moot as Petitioners never posted a supersedeas bond to stay the State Court's Motion for Confirmation of Sale. *City Bank v. Saje Ventures II*, 7 Haw. App. 130, 748 P.2d 812 (1988). Accordingly, Petitioners' Writ of Certiorari should be denied.

A. *In Rem* Orders Are Not A Violation Of Due Process

Federal law has held that *in rem* orders in a bankruptcy proceeding which apply to property co-owned by others who are not parties to the bankruptcy proceeding are not a violation of due process where there have been serial bankruptcy filings and where the Debtor and others who claim an interest in the property have not acted in good faith under the Bankruptcy Code. *In re Roben*, 294 B.R. 840 (E.D. Ar. 2003); *In re Fernandez*, 212 B.R. 361, 371 (C.D. Cal. 1997); *In re Yiman*, 214 B.R. 463, 466-67 (D.Md. 1997).

In *In re Roben*, 294 B.R. 840 (E.D. Ar. 2003), the Debtor and Debtor's spouse filed six bankruptcy petitions during a six year period. The Court noted that their multiple filings were evidence that they were engaged in an abuse of the bankruptcy process. *Id.* at 845. The Court found that although this particular bankruptcy was only brought by the Debtor, the Debtor and the Debtor's spouse acted in concert

to abuse the automatic stay provisions of the Bankruptcy Code and charged the Debtor's spouse with "constructive notice" of the proceeding, which did not violate his due process rights. *Id.* at 848.

The Court ruled that since the subject property was part of the bankruptcy estate, it had jurisdiction over that property sufficient to enter an *in rem* order. The Court also found that it had authority under 11 U.S.C. § 105(a) to override the need for formal service of process on the Debtor's spouse. *Id.* at 848 (citing *In re Fernandez*, 212 B.R. 361, 371 (C.D. Cal. 1997); *In re Yiman*, 214 B.R. 463, 466-67 (D.Md. 1997)).

In the case at hand, the Abad Defendants filed six bankruptcy petitions within a fifteen month period, all for the purpose of keeping the foreclosure proceeding in abeyance. The Bankruptcy Judge set forth in the Order Granting Movant And Secured Creditor City Bank's Motion For Relief From The Automatic Stay that: "IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the relief is being granted 'in rem' because the Debtor and other persons who claim an interest in the Property have not acted in good faith to reorganize or seek discharge of their debts under the Bankruptcy Code but, rather have used the filing of a bankruptcy case as an obstruction to a lender's efforts to foreclose on mortgaged property." *See* Appendix B.

Applying the *In re Roben* case, 294 B.R. 840 (E.D. Ar. 2003), to the case at hand, it is clear that Gloria Abad and Artemio Abad acted in concert to abuse the

automatic stay provisions of the Bankruptcy Code, and that Artemio Abad had constructive notice of the proceeding. As such, the *In Rem* Order did not violate Artemio Abad's due process rights.

In the Petition for Writ of Certiorari, Petitioners cite to *In re Yiman*, 214 B.R. 463 (D.Md. 1997) for the proposition that *in rem* orders can constitutionally operate only to bar "subsequent purchasers" and not previous title holders, such as a debtor's current spouse. *See* Writ of Certiorari at page 10. However, this is not what *In re Yiman*, *id.*, holds. In *In re Yiman*, *id.*, debtor and her spouse filed seven bankruptcy petitions over a five year period. Although the nondebtor spouse was not a party to the case, the Court invoked its equitable power under 11 U.S.C. § 105(a) to prevent a continued abuse of the bankruptcy code and created an equitable servitude where the filing of a new bankruptcy petition by debtor or debtor's spouse within a specified period of time would not extend the protection of the automatic stay to the subject property and would not interfere with any foreclosure proceeding then pending or thereafter filed. *Id.* at 466-467.

Moreover, in the Petition for Writ of Certiorari, Petitioners cite to *In re Snow*, 201 B.R. 968 (C.D. Cal. 1996), for the proposition that although the Court granted an *in rem* order and bound subsequent purchasers for the requested 180 day period, it prohibited the issuance of an order binding co-owners as they had not been brought before the Court. *See* Writ of Certiorari at page 10. However, the *In re Snow*

case, *id.*, is distinguishable from the case at hand. In *In re Snow*, *id.*, it appears that only two bankruptcies concerning the subject property were filed in a four year period (one by Stephen Gelff in 1992 and one by Tony Snow in 1996). Additionally, the co-owners of the property at the time of the most recent filing, Charles Smith, Tony Snow, Thomas Richards, Bill Roberts and Eastern Financial Company, do not appear to be related to each other. Contrasting this to the case at hand, Debtor and Debtor's spouse were obviously related, lived together, were represented by the same counsel, and the Court held that they abused the Bankruptcy Code due to their numerous bankruptcy filings in a short period of time. *See* Appendix B. Moreover, it should be noted that in *In re Snow*, the Court held that it was an appropriate case to grant *in rem* relief, which relief from the automatic stay runs with the property. *Id.* at 971.

Accordingly, it is clear from the federal cases that there was no due process violation by the U.S. Bankruptcy Court granting the *In Rem* Order and the Hawaii Court granting the foreclosure summary judgments in the instant case. As such, Petitioners' Writ of Certiorari should hereby be denied.

B. Actions Of A Debtor And A Debtor's Husband Can Be Imputed To Each Other

Federal law has specifically held that actions of a Debtor and her husband can be imputed to each other due to their unity of interest and concert of action.

Under such circumstances, orders binding one family member should bind the other family members as well. *In re Ouverson*, 79 B.R. 830 (N.D. Iowa 1987); *In re Kinney*, 51 B.R. 840 (C.D. Cal. 1985). Pursuant to 11 U.S.C. § 105, the Court is able to bind parties not before it due to this unity of interest and concert of action. *In re Kinney*, 51 B.R. 840 (C.D. Cal. 1985). Accordingly, Artemio Abad's due process rights have not been violated, and Petitioners' Writ of Certiorari should be denied.

In *In re Kinney*, *id.*, eight of ten bankruptcies were filed by ten different family members of the Kinney family in order to obtain the automatic stay as to the subject property. The Court held that their concerted, intertwined efforts to prevent a lender from realizing on its security could be viewed as the acts of one entity, with many individuals carrying out these acts. *Id.* at 845. The Court ruled that the actions of each family member can be imputed to the rest of the family due to the unity of interest and concert of action. *Id.* The Court made an analogy to a criminal conspiracy where each family member would be liable for the acts of the others in furtherance of this scheme stating that in the presence of such a scheme the individuality of each of the debtors is blurred, revealing one common entity with five operatives. *Id.* at 845-846. This case held that orders binding one family member should bind other family members as well. The Court also ruled that it had the power to bind parties not before the Court pursuant to 11 U.S.C. § 105. *Id.* at 846.

Similarly, in *In re Ouverson*, 79 B.R. 830 (N.D. Iowa 1987), the Court held that there was no question that four of the seven bankruptcy filings were filed by Debtor and/or her husband in order to invoke an automatic stay as to the subject property encumbered by a mortgage. The Court ruled that the Debtor and the Debtor's husband's concerted, intertwined acts to prevent the foreclosure could be viewed as the acts of one entity. *Id.* at 833. The Court found that the actions of the Debtor and her husband could be imputed to each other because of their unity of interest in preventing the foreclosure and their concert of action. *Id.*

Hence, Debtor Gloria Abad's actions are imputed to Artemio Abad due to their unity of interest in preventing the foreclosure of the subject properties and their concert of action, where together they filed four foreclosures in fifteen months and they, along with another family member, filed six foreclosures in fifteen months. As such, Artemio Abad was not denied due process by the Court's granting of the *In Rem* Order in his wife's bankruptcy case, and Petitioner's Writ of Certiorari should be denied.

C. Notice Of The In Rem Order Was Given To Artemio Abad's Attorney, Who Was An Agent For Artemio Abad

It is undisputed that the *In Rem* Order was provided to Artemio Abad's counsel on September 12, 2002 and the auction for the subject property did not

take place until October 8, 2002. Federal law has held that an attorney is the agent for his or her client. Hence, Artemio Abad had ample time to challenge the *In Rem* Order prior to the auction if he so chose, but he did not do so.

A relationship between an attorney and a client he or she represents is one of agent and principal. *Veal v. Geraci*, 23 F.3d 722 (2nd Cir. 1994). The basic laws of agency dictate that an agent's knowledge is imputed to his or her principal. There is a presumption that an agent will relay to his or her principal any and all relevant information that he or she has acquired. *Novak v. TRW, Inc.*, 822 F.Supp. 963, 974 (E.D.N.Y. 1993).

In *In re Felberman*, 196 B.R. 678 (S.D.N.Y. 1995), the Court held that knowledge of an order possessed by Debtor's attorney, by virtue of his prior representation of Debtor's husband, could be imputed to Debtor. In the *Felberman* case, the Court entered an Order on October 17, 1994, in Aaron Felberman's bankruptcy case providing that any future bankruptcy filing by Aaron Felberman or his wife would not result in an automatic stay as to a specific creditor absent a specific order from the Court. *Id.* at 683. A foreclosure auction was scheduled by the creditor for January 10, 1995. Mrs. Felberman filed a bankruptcy petition on January 9, 1995. Mrs. Felberman could have made a motion challenging the validity of the Order or she could have applied for an Order requesting a stay as allowed in the October 17, 1994 Order; however, she did not do so. The Court ruled

that Mrs. Felberman was not denied her due process rights, she simply chose not to exercise them. *Id.* The Court ruled that most likely Mrs. Felberman learned of the October 17, 1994 Order from her husband but, even if she didn't, there was no question that her attorney knew of the October 17, 1994 Order. *Id.* at 684. The Court held that given the attorney-client relationship, the attorney's knowledge must be imputed to his client. *Id.* at 684-685.

Similarly, in the case at hand, it is undisputed that the *In Rem* Order was provided to Artemio Abad's counsel on September 12, 2002 and the auction for the subject properties did not take place until October 8, 2002. Hence, Artemio Abad could have filed a motion with the bankruptcy court disputing the *In Rem* Order on due process grounds or he could have filed a temporary restraining order preventing the auction from taking place but he failed to do so. As such, like Mrs. Felberman, Artemio Abad had notice of the *In Rem* Order and was not denied his due process rights; he simply chose not to exercise them. Accordingly, Petitioners' Writ of Certiorari should be denied.

D. Petitioners' Writ Of Certiorari Is Moot As There Were Bona Fide Purchasers Of The Subject Properties At The Foreclosure Auction

It is well settled law that a case is moot if the reviewing court can no longer grant effective relief.

City Bank v. Saje Ventures II, 7 Haw. App. 130, 134, 748 P.2d 812, 815 (1988). The general rule is that the right of a good faith purchaser to receive property acquired at a judicial foreclosure sale cannot be affected by the reversal of an order confirming sale where a supersedeas bond has not been filed. *Id.* at 133, 748 P.2d at 814. In the case at hand, no supersedeas bond was filed. Hence, the U.S. Supreme Court can no longer grant effective relief and this matter is moot.

In *Saje Ventures II*, *id.* at 132, 748 P.2d at 814, the Commissioner held a foreclosure auction. There were two bids, of which a third party purchaser's bid was the highest. The lender moved to confirm the sale. The Saje Defendants opposed the confirmation; however, the motion for confirmation was granted. *Id.* at 132, 748 P.2d at 814. The Saje Defendants filed a motion for reconsideration, which was denied. *Id.* at 133, 748 P.2d at 814. The Saje Defendants then filed a timely appeal. The Hawaii Intermediate Court of Appeals denied the appeal ruling that the Saje Defendants did not file a supersedeas bond to stay the enforcement of the Confirmation Order. The Hawaii Intermediate Court of Appeals held that even if they were to reverse the Confirmation Order, the closed sale of the subject property to the third party purchaser could not be vitiated and they could not direct a new sale of the subject property. *Id.* at 134, 748 P.2d at 815. Hence, the Hawaii Intermediate Court of Appeals held that the matter was moot and dismissed the appeal. *Id.* at 134, 748 P.2d at 815.

In the case at hand, the *In Rem* Order was entered on September 9, 2002. *See* Appendix B. The subject properties (i.e., the Salt Lake property and the Pearl City Property) were sold at a foreclosure auction on October 8, 2002 to third-party bona fide purchasers. On February 12, 2003, the Court entered an Order Confirming the Sale of the Subject Properties. The Petitioners filed an appeal and the Hawaii Intermediate Court of Appeals dismissed the appeal by issuing a Summary Disposition Order on December 28, 2009 concluding that the appeal was moot because Petitioners had not posted a supersedeas bond to stay the State Court's order confirming the foreclosure sales. *See* Appendix C.

As such, Petitioners' Writ of Certiorari should be dismissed as it is moot.

III. CONCLUSION

As set forth herein, federal law has held that *in rem* orders in a bankruptcy proceeding which apply to property co-owned by others who are not parties to the bankruptcy proceeding are not a violation of due process where, as in the instant case, there have been serial bankruptcy filings and where the Debtor and others who claim an interest in the property have not acted in good faith under the Bankruptcy Code. Moreover, federal law has specifically held that actions of a Debtor and her husband can be imputed to each other. Additionally, it is undisputed that the *In Rem* Order was provided to Artemio Abad's

attorney, Gary Dubin, Esq., on September 12, 2002 and the auction for the subject property did not take place until October 8, 2002. Federal law has held that an attorney is the agent for his client. The basic laws of agency dictate that an agent's knowledge is imputed to his principal. There is a presumption that an agent will relay to his principal any and all relevant information that he has acquired. Hence, Artemio Abad had ample time to challenge the *In Rem* Order prior to the auction if he so chose, but he did not do so. Instead, the subject properties were sold to third-party bona fide purchasers rendering Petitioners' Writ of Certiorari moot as Petitioners never posted a supersedeas bond to stay the State Court's Motion for Confirmation of Sale. Accordingly, Petitioners' Writ of Certiorari should respectfully be denied.

Respectfully submitted,

MITZI A. LEE
Counsel of Record
Attorney for Respondent
Central Pacific Bank,
Successor-In-Interest to City Bank

Honolulu, Hawaii
September 29, 2010

[LOGO] **PACER**
Case Locator

All Court Types Party Search
Thu Sep 23 19:58:15 2010
2 records founds

User: cl2071
Client:
Search: All Court Types Party Search Name Abad, Gloria P. All Courts Page: 1

Bankruptcy Results

	Party Name ▼	Court	Case	Ch	Date Filed	Date Closed	Disposition
1.	Abad, Gloria P. (db)	hibke	1:01-bk-02461	7	06/20/2001	09/25/2001	Dismissed for Other Reason
2.	Abad, Gloria P. (db)	hibke	1:01-bk-02358	7	07/01/2002	10/16/2002	Standard Discharge 10/16/2002

Receipt 09/23/2010 19:58:16 9597758

User cl2071
Client
Description All Court Types Party Search
Name Abad, Gloria P. All Courts Page: 1
Pages 1 ($0.08)

[LOGO] **PACER**
Case Locator

All Court Types Party Search
Thu Sep 23 19:59:00 2010
2 records founds

User: cl2071
Client:
Search: All Court Types Party Search Name Abad, Jennifer All Courts Page: 1

Bankruptcy Results

	Party Name ▼	Court	Case	Ch	Date Filed	Date Closed	Disposition
1.	Abad, Jennifer Ann (db)	hibke	1:01-bk-03867	13	10/02/2001	11/30/2001	Dismissed for Other Reason
2.	Abad, Jennifer Ann P. (db)	hibke	1:01-bk-04564	7	11/21/2001	12/28/2001	Dismissed for Other Reason

Receipt 09/23/2010 19:59:01 9597774

User cl2071
Client
Description All Court Types Party Search
Name Abad, Jennifer All Courts Page: 1
Pages 1 ($0.08)

APPENDIX B

Of Counsel:
HISAKA STONE GOTO
YOSHIDA COSGROVE & CHING

MITZI A. LEE 6059-0
Pacific Guardian Center, Mauka Tower
737 Bishop Street, Suite 3000
Honolulu, Hawaii 96813
Telephone No.: 523-0451

Attorney for Movant and
Secured Creditor CITY BANK

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re GLORIA P. ABAD, Debtor.	Case No. 02-02358 (Chapter 7) ORDER GRANTING MOVANT AND SECURED CREDITOR CITY BANK'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY; EXHIBIT "A" Hearing Date: August 21, 2002 Time: 1:30 p.m. Judge: The Honorable Robert J. Faris

ORDER GRANTING MOVANT AND SECURED CREDITOR CITY BANK'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY

Movant and Secured Creditor CITY BANK filed its Motion for Relief from the Automatic Stay (hereinafter "Motion") herein on July 19, 2002. The Motion came on for hearing on August 14, 2002 at 1:30 p.m. and was continued to August 21, 2002 at 1:30 p.m. At the continued hearing, Peter Aduja, Esq. appeared on behalf of Debtor Gloria P. Abad and Mitzi A. Lee, Esq. appeared on behalf of City Bank.

The Court has heard the arguments of counsel and has carefully considered the Motion, the Notice of Hearing, the Memorandum in Support of the Motion, the Declaration of Ed Castro, the Declaration of Mitzi A. Lee, Debtor Gloria Abad's Opposition and all other relevant documents contained in the file herein, and based upon such consideration, it is hereby ORDERED THAT:

The aforesaid Motion is granted, and the automatic stay of 11 U.S.C. 362(a) as imposed against City Bank with respect to the Debtor, Debtor's Estate, and that certain real property located at 3345 Ala Akulikuli Street, Honolulu, Hawaii 96818 (hereinafter "Property"), of which a copy of the description of the Property is attached hereto as Exhibit "A", and made a part hereof, is terminated as of September 4, 2002; and

Further, that as of September 4, 2002, City Bank, its attorneys, its agents, any foreclosure commissioner or successor commissioner can proceed to exercise any and all of their rights and remedies with respect to the Property, including but not limited to, foreclosure of City Bank's Mortgage against the Property and recovery of possession of said Property.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the relief is being granted "in rem" because the Debtor and other persons who claim an interest in the Propeorty [sic] have not acted in good faith to reorganize or seek discharge of their debts under the Bankruptcy Code but, rather have used the filing of a bankruptcy case as an obstruction to a lender's efforts to foreclose on mortgaged property. As used herein, "in rem" relief means that the relief from stay is granted not only personally against the Debtor but with respect to the Property; and shall be deemed binding and of full force and effect in any subsequent bankruptcy case, whether commenced by a debtor in this case or any another [sic] individual or entity claiming an interest in the Property. This in rem relief shall be effective only until the earlier of (i) 240 days after the date of entry of this order, or (ii) the recovery of possession by a purchaser at a judicial or non-judicial sale upon foreclosure of the subject mortgage.

It is hereby ordered that City Bank may not obtain a deficiency judgment without further order of this Court.

DATED: Honolulu, Hawaii, **SEP 0 9 2002**

/s/ Robert J. Faris
UNITED STATES
BANKRUPTCY COURT

In re Gloria P. Abad, Case No. 02-02358; ORDER GRANTING MOVANT AND SECURED CREDITOR CITY BANK'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY

TMK: (1) 1-1-053-032

EXHIBIT "A"

Title Guaranty of Hawaii, Inc.
HONOLULU, HAWAII

All of that certain parcel of land situate at Moanalua, Honolulu, City and County of Honolulu, State of Hawaii, described as follows:

LOT 2200, area 9,012 square feet, more or less, as shown on Map 315, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii with Land Court Application No. 1074 of the Trustees under the Will and of the Estate of Samuel M. Damon, deceased;

Being land(s) described in Transfer Certificate of Title No. 505,278 issued to ARTEMIO MARCOS ABAD, as Trustee under that certain unrecorded Artemio M. Abad Revocable Trust dated February 25, 1994, as to

an undivided 1/2 interest, and GLORIA PASCUA ABAD, as Trustee under that certain unrecorded Gloria P. Abad Revocable Trust dated February 25, 1994, as to an undivided 1/2 interest.

BEING THE PREMISES ACQUIRED BY DEED

GRANTOR:	ARTEMIO MARCOS ABAD and GLORIA PASCUA ABAD, husband and wife
GRANTEE:	ARTEMIO MARCOS ABAD, as Trustee under that certain unrecorded Artemio M. Abad Revocable Trust dated February 25, 1994, as to an undivided 1/2 interest, and GLORIA PASCUA ABAD, as Trustee of the Gloria P. Abad Revocable Trust, dated February 25, 1994, as to an undivided 1/2 interest, as Tenants in Common
DATED:	February 25, 1994
FILED:	Land Court Document No. 2437990
RECORDED:	Document No. 98-019075

APPENDIX C

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27953

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

CITY BANK, Plaintiff/Counterclaim-Defendant/Appellee, v. ARTEMIO MARCOS ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE ARTEMIO M. ABAD REVOCABLE TRUST; GLORIA PASCUA ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE GLORIA P. ABAD REVOCABLE TRUST; JENNIFER ABAD, Defendants/Cross-Claim Defendants/Appellants, and FINANCE FACTORS, LIMITED, Defendant/Crossclaimant/Counterclaimant/Appellee; DIRECTOR OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF HONOLULU, Defendants/Cross-Claim Defendants/Appellees; and FELIX PASCUA; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS, DOE "NON-PROFIT" CORPORATIONS 1-10, and DOE GOVERNMENTAL UNITS 1-50, Defendants; and FINANCE FACTORS, LIMITED, Third-Party Plaintiff-Appellee, v. AMERICAN GENERAL FINANCE, INC., Third-Party Defendant-Appellee, and ERLINDA GONZALES and WILSON U. PASCUA, individually and doing business as HONLAND REALTY, Third-Party Defendants

APPEAL FROM THE CIRCUIT
COURT OF THE FIRST CIRCUIT
(Civ. No. 01-1-0995)

SUMMARY DISPOSITION ORDER
(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

(Filed Dec. 28, 2009)

In this appeal from a post-judgment proceeding in a foreclosure lawsuit, Defendants/Cross-Claim Defendants/Appellants Artemio Marcos Abad, Gloria Pascua Abad and Jennifer Abad (the Abad Defendants) appeal from the April 25, 2006 "Order Denying the Abad Defendants' Rule 60(b)(4) Motion to Set Aside: (1) Findings of Fact, Conclusions of Law and Order Granting Defendant and Third-Party Plaintiff Finance Factors, Limited's Motion for Default Judgment Against Defendants Artemio Marcos Abad, Individually and as Trustee of the Artemio M. Abad Revocable Trust, Gloria P. Abad, Individually and as Trustee of the Gloria Pascua Abad Revocable Trust, Jennifer Abad and Felix Pascua and Summary Judgment as to All Other Parties and for Interlocutory Decree of Foreclosure as to All Claims and All Parties Filed on May 24, 2001, Filed on March 4, 2002,[1] [ ] (2) Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for Summary Judgment on All Claims and Against All Parties,

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[1] Hereinafter referred to as the "March 4, 2002 Foreclosure Order."

Interlocutory Decree of Foreclosure and Order of Sale, Filed February 6, 2002,[2] and (3) All Subsequent Orders, Judgments, Commissioner's Deeds, Title Transfers, and Writs in this Action Entered Pursuant Thereto" (the April 25, 2006 Post-Judgment Order) entered by the Circuit Court of the First Circuit (circuit court).[3]

The Abad Defendants argue on appeal that the circuit court erred

> in denying [Hawai'i Rules of Civil Procedure (HRCP)] Rule 60(b)(4) relief as it originally lacked jurisdiction, pursuant [to] the automatic stay provisions of Section 362 of Tile [sic] 11 of the United States Code and the decision of the Intermediate Court of Appeals held in Island Insurance Co., Inc. v. Santos, 86 [Hawai'i] 363, 949 P.2d 203 (App. 1997), to auction the subject properties and to confirm the subject foreclosure sales.

BACKGROUND

In order to purchase real estate in Pearl City[4] (the Pearl City Property) and Salt Lake[5] (the Salt

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[2] This order was filed on June 20, 2002 and is hereinafter referred to as "the June 20, 2002 Foreclosure Order."

[3] The Honorable Karen N. Blondin presided.

[4] This property is located at 98-1457 Ho'omahie Loop, Pearl City, Hawai'i.

[5] This property is located at 3345 'Ala Akulikuli Street, Honolulu, Hawai'i.

Lake Property), the Abad Defendants obtained loans from City Bank, Defendant/Crossclaimant/Counterclaimant/Third-Party Plaintiff/Appellee Finance Factors, Limited (Finance Factors), and Third-Party Defendant/Appellee American General Finance, Inc. (American General). The Abad Defendants mortgaged the Pearl City Property and the Salt Lake Property to Finance Factors. The Abad Defendants additionally mortgaged the Salt Lake Property to City Bank. The Abad Defendants additionally mortgaged the Pearl City Property to American General. The Abad Defendants eventually defaulted on some of the loans.

City Bank filed a complaint to foreclose on the Salt Lake Property against the Abad Defendants, Finance Factors, Defendants/Cross-Claim Defendants/Appellees the Director of Budget and Fiscal Services of the City and County of Honolulu (the City) and Felix Pascua.

Finance Factors asserted a counterclaim for foreclosure against City Bank and a cross-claim for foreclosure against the Abad Defendants, the City, and Felix Pascua. Finance Factors also asserted a third-party complaint for foreclosure against American General, and Third-Party Defendants Erlinda Gonzales (Gonzales) and Wilson U. Pascua doing business as Honland Realty (Wilson Pascua).

Thereafter, the following events occurred:

- The circuit court entered the March 4, 2002 Foreclosure Order, granting Finance Factors's motion for default judgment against the Abad

Defendants and Felix Pascua, and summary judgment against all other parties on Finance Factors's counterclaim, Finance Factors's cross-claims, and Finance Factors's third-party claims.

- On March 4, 2002, the circuit court entered an HRCP Rule 54(b) certified judgment of foreclosure in favor of Finance Factors and (a) against City Bank on Finance Factors's counterclaim, (b) against the Abad Defendants, the City, and Felix Pascua on Finance Factors's cross-claim, and (c) against American General, Gonzales, and Felix Pascua on Finance Factors's third-party complaint.

- The circuit court entered the June 20, 2002 Foreclosure Order granting City Bank's motion for summary judgment against the Abad Defendants, Finance Factors, the City and Felix Pascua on City Bank's complaint for foreclosure.

- On June 20, 2002, the circuit court entered an HRCP 54(b) certified judgment of foreclosure in favor of City Bank and against the Abad Defendants, Finance Factors, the City, and Felix Pascua as to City Bank's complaint for foreclosure.

- On August 8, 2002, the United States Bankruptcy Court for the District of Hawai'i (Bankruptcy Court) granted Finance Factors's unopposed motion for relief from the automatic stay caused by the filing of Gloria Abad's bankruptcy petition. This relief from the stay was granted "'in rem' because the Debtor and other persons who claim an interest in the Property have not acted in good faith to reorganize or seek discharge of their debts. . . . As used herein, 'in rem' relief means

that the relief from stay is granted not only personally against the Debtor but with respect to the subject property."[6] Notice of this order was served on the Abad Defendants' attorney on August 19, 2002.

- After a motion and hearing, the Bankruptcy Court granted City Bank relief from the automatic stay created by Gloria Abad's petition for bankruptcy. This September 9, 2002 order was also granted "in rem" but applied to the Salt Lake Property only. Notice of this order was served on the Abad Defendants' attorney on September 13, 2002.

- On October 8, 2002, the foreclosure auction for the Salt Lake Property and the Pearl City Property occurred.

- On November 14, 2002, Gloria Pascua Abad filed a notice of appeal from the June 20, 2002 Foreclosure Order, which the supreme court clerk docketed as supreme court case number 25474.

- On November 14, 2002, the Abad Defendants moved the circuit court to set aside the March 4, 2002 Foreclosure Order pursuant to HRCP 60(b), arguing that the circuit court lacked subject matter jurisdiction based on their claim that the mortgage loan was void as it was made with an unlicensed mortgage broker.

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[6] The "subject property" included both the Pearl City Property and the Salt Lake Property.

- On December 24, 2002, the circuit court denied the Abad Defendants' HRCP 60(b) motion to set aside the March 4, 2002 Foreclosure Order.

- On January 15, 2003, the Abad Defendants filed a notice of appeal from the December 24, 2002 order denying the Abad Defendants' HRCP 60(b) motion to set aside the March 4, 2002 Foreclosure Order, which the supreme court clerk docketed as supreme court case number 25587.

- On February 12, 2003, the circuit court entered an order and HRCP Rule 52(b) – certified judgment confirming the sales of the Salt Lake Property[7] and the Pearl City Property[8] to third-party purchasers and directing the distribution of the sales proceeds.

- On March 14, 2003, the Abad Defendants filed a notice of appeal from the February 12, 2003 order and the February 12, 2003 HRCP 54(b) judgment, which the supreme court clerk docketed as supreme court case number 25693.

- On January 12, 2005, we issued a published opinion on the consolidated appeals of supreme court case numbers 25474, 25587, and 25693 that

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[7] On May 9, 2003, the circuit court extended the time to close the sale of the Salt Lake Property for one day, or March 20, 2003, to conform with the actual date of closing on the Salt Lake Property.

[8] On April 11, 2003, the circuit court extended the time to close the sale of the Pearl City Property to ten days after the date of the order, or April 21, 2003. A writ of possession for the Pearl City Property was issued by the circuit court on May 6, 2003.

dismissed parts of the appeal and affirmed the orders that were the subject of the remaining parts of the appeal. *City Bank v. Abad*, 106 Hawai'i 406, 105 P.3d 1212 (App. 2005) (*Abad I*). In this opinion, we

- Dismissed the appeal in number 25474 as untimely,
- Dismissed the appeal in number 25693 as untimely in part and premature in part, and
- In number 25587, dismissed the appeal from the circuit court's November 14, 2002 oral confirmation of the foreclosure sales and affirmed the December 24, 2002 order denying the Abad Defendants' November 14, 2002 HRCP Rule 60(b) motion.
- In so doing, we ruled that the Abad Defendants had not shown the Bankruptcy Court's "in rem" orders lifting the automatic bankruptcy stay as to Finance Factors and City Bank were invalid, either because the Bankruptcy Court "lacked jurisdiction of the parties or otherwise acted in a manner inconsistent with due process of law." *Abad I*, 106 Hawai'i at 411, P.3d at 1217.

- Central Pacific Bank became City Bank's successor-in-interest in this case as the result of a corporate merger between Central Pacific Bank and City Bank.

On February 21, 2006, the Abad Defendants again moved the circuit court pursuant to HRCP Rule 60(b) to set aside (1) the March 4, 2002 Foreclosure

Order, (2) the June 20, 2002 Foreclosure Order, and (3) all subsequent orders and judgments that the circuit court entered pursuant thereto. The circuit court denied this motion by way of its April 25, 2006 Post-Judgment Order. On May 24, 2006, the Abad Defendants filed a notice of appeal from the April 25, 2006 Post-Judgment order.

JURISDICTION

Before we consider the merits of this appeal, we must decide whether we have jurisdiction to consider this matter. "An appellate court has . . . an independent obligation to ensure jurisdiction over each case and to dismiss the appeal sua sponte if a jurisdictional defect exits [sic]." *State v. Graybeard*, 93 Hawai'i 513, 516, 6 P.3d 385, 388 (App. 2000).

This is an appeal from a post-judgment order. Hawaii Revised Statutes (HRS) § 641-1(a) (Supp. 2005) authorizes appeals from final judgments, orders or decrees. "A post-judgment order is an appealable final order under HRS § 641-1(a) if the order ends the proceedings, leaving nothing further to be accomplished." *Ditto v. McCurdy*, 103 Hawai'i 153, 157, 80 P.3d 974, 978 (2003). Although, for the purpose of appealability, a separate judgment is usually necessary under HRCP Rule 58 and the holding in *Jenkins v. Cades Scutte Fleming & Wright*, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994), "the separate judgment requirement articulated in *Jenkins* is inapposite in the post-judgment context." *Ditto*, 103

Hawai'i at 158, 80 P.3d at 979. Accordingly, we initially appear to have jurisdiction over this appeal pursuant to HRS § 641-1(a).

However,

> A case is moot if it has lost its character as a present, live controversy of the kind that must exist if courts are to avoid advisory opinions on abstract propositions of law. The rule is one of the prudential rules of judicial self-governance founded in concern about the proper – and properly limited – role of the courts in a democratic society. We have said the suit must remain alive throughout the course of litigation to the moment of final appellate disposition to escape the mootness bar. . . . Simply put, a case is moot if the reviewing court can no longer grant effective relief.

Kaho'ohanohano v. State, 114 Hawai'i 302, 332, 162 P.3d 696, 726 (2007) (emphasis removed, citations, internal quotation marks, and brackets omitted, and format altered).

Thus, for example, in an appeal from a foreclosure case, the defendants' failure to stay the effect of an order confirming a foreclosure sale of property to a third-party, which apparently was a good faith purchaser, rendered moot the defendants' appeal from the order confirming the sale. *City Bank v. Saje Ventures II*, 7 Haw. App. 130, 132, 748 P.2d 812, 814 (1988). In support of the decision, we relied on the general rule that "the right of a good faith purchaser

to receive property acquired at a judicial sale cannot be affected by the reversal of an order ratifying the sale where a supersedeas bond has not been filed." *Id.* at 133, 748 P.2d at 814 (internal quotation marks and citation omitted).

> Since the Saje Defendants did not stay the effect of the confirmation order and since there has been a closing of the sale of the Property to Outrigger which cannot be undone under the facts and the law, we cannot grant the relief sought by the Saje Defendants. Therefore, the appeal is moot and must be dismissed.

Id. at 132, 748 P.2d at 814.

In the instant case, the Abad Defendants did not file a supersedeas bond and obtain a court order staying the February 12, 2003 judgment confirming the foreclosure sales. Like the debtor in *City Bank v. Saje Ventures II*, the Abad Defendants ask this court to reverse the April 25, 2006 Post-Judgment Order, although they did not file a supersedeas bond and obtain a court order staying the February 6, 2003 order and judgment confirming the foreclosure sale.

Granted, "[a]n exception to the rule is where the reversal is based on jurisdictional grounds[,]" and the Abad Defendants are arguing that the circuit court lacked jurisdiction to enter the February 12, 2003 order and judgment confirming the foreclosure sale. Nevertheless, an examination of the Abad Defendant's prior appeal and our decision in *Abad I*, shows

that the Abad Defendants were raising the same jurisdiction argument that was rejected by this court in *Abad I*. In *Abad I*, this court held that the Abad Defendants failed to carry their burden on appeal, that is to say, did not show that the Bankruptcy Court's order lifting its stay over the properties in question was invalid and thus rejected the Abad Defendants' argument that the circuit court lacked jurisdiction to confirm the sales of the properties in this case.

It is true that the Supreme Court of Hawai'i has explicitly recognized three exceptions to the mootness doctrine:

> (1) the "capable of repetition, yet evading review" exception (the CRER exception);
>
> (2) the public interest exception; and
>
> (3) the collateral consequences exception.

Hamilton Ex Rel Lethem v. Lethem, 119 Hawai'i 1, 5-10, 193 P.3d 839, 843-48 (2008). However, none of these three exceptions applies to the instant case.

With regard to the CRER exception,

> [t]he phrase, "capable of repetition, yet evading review," means that a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because the passage of time would prevent any single plaintiff from remaining subject to the restriction

> complained of for the period necessary to complete the lawsuit.

Lethem, 119 Hawai'i at 5, 193 P.3d at 843 (citation and some internal quotation marks omitted). The CRER exception to the mootness doctrine does not appear to apply to the instant case because the instant case would not evade review but for the fact that the Abad Defendants chose not to file a supersedeas bond. Therefore, the CRER exception to the mootness doctrine does not apply to the instant case.

With regard to the public interest exception, the Supreme Court of Hawai'i has explained that, "[w]hen analyzing the public interest exception, this court looks to (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for future guidance of public officers, and (3) the likelihood of future recurrence of the question." *Lethem*, 119 Hawai'i at 6-7, 193 P.3d at 844-45 (citation, internal quotation marks, and brackets omitted). The public interest exception to the mootness doctrine does not appear to apply to the instant case because (1) a foreclosure case arises out of a private contract between parties that does not involve the government, and, thus, a foreclosure is more of a dispute of a private nature rather than a public nature, (2) an authoritative determination for future guidance already exists within the holding in *Saje Ventures II*, 7 Haw. App. at 132, 748 P.2d at 814, and (3) the questions within the instant case will recur only when parties choose not to file a

supersedeas bond to stay the circuit court's ruling pending appeal. Therefore, the public interest exception to the mootness doctrine does not appear to apply to the instant case.

With regard to the collateral consequences exception, the Supreme Court of Hawai'i has "adopted the collateral consequences exception to the mootness doctrine in cases involving domestic violence TROs where there is a reasonable possibility that prejudicial collateral consequences will occur as a result of the entry of the TRO." *Lethem*, 119 Hawai'i at 9-10, 193 P.3d at 847-48 (internal quotation marks omitted). The collateral consequences exception to the mootness doctrine does not apply to the instant case because the instant case does not involve domestic violence or a temporary restraining order. Furthermore, the Abad Defendants could have avoided any prejudicial collateral consequences if they filed a supersedeas bond to stay the circuit court's ruling pending this appeal. Therefore, the collateral consequences exception to the mootness doctrine does not apply to the instant case.

Our disposition makes it unnecessary to reach the Abad Defendants' other arguments on appeal.

CONCLUSION

Therefore, this appeal from the April 25, 2006 Post-Judgment Order of the Circuit Court of the First Circuit is hereby dismissed.

DATED: Honolulu, Hawai'i, December 28, 2009.

On the briefs:

Gary V. Dubin,
for Defendants/Cross-Claim
Defendants/Appellants.

/s/ Daniel R. Foley
Presiding Judge

Donald K.O. Wong
Paul B.K. Wong
Kara M.L. Young
(McCorriston Miller Mukai
MacKinnon),
for Defendant/Cross-
claimant/Counterclaimant/
Third-Party Plaintiff/Appellee
Finance Factors, Limited.

/s/ Alexa D.M. Fujise
Associate Judge

/s/ Katherine G. Leonard
Associate Judge

Mitzi A. Lee
(Ching & Lee),
for Plaintiff/Counterclaim-
Defendant/Appellee Central
Pacific Bank, Successor by
Merger to City Bank.

12

No. 10-293

Supreme Court, U.S.
FILED
SEP 29 2010

In The
Supreme Court of the United States

ARTEMIO MARCOS ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE ARTEMIO M. ABAD REVOCABLE TRUST; GLORIA PASCUA ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE GLORIA P. ABAD REVOCABLE TRUST,

Petitioners,

v.

FINANCE FACTORS, LIMITED; CENTRAL PACIFIC BANK, SUCCESSOR-IN-INTEREST TO CITY BANK; DIRECTOR OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF HONOLULU; AMERICAN GENERAL FINANCE, INC.; ERLINDA GONZALES AND WILSON U. PASCUA, INDIVIDUALLY AND DOING BUSINESS AS HONLAND REALTY,

Respondents.

On Petition For Writ Of Certiorari To The Intermediate Court Of Appeals Of Hawai`i

RESPONDENT FINANCE FACTORS, LIMITED'S BRIEF IN OPPOSITION

KENNETH J. MANSFIELD
Counsel of Record
DONALD K.O. WONG
PAUL B.K. WONG
MCCORRISTON MILLER MUKAI MACKINNON LLP
P.O. Box 2800
Honolulu, HI 96803-2800
(808) 529-7300
Mansfield@m4law.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the matter raised by Petitioners is moot.

2. Whether the Court has jurisdiction under 28 U.S.C. section 1257(a) to review this matter where the Intermediate Court of Appeals of the State of Hawai`i ("Appeals Court") neither ruled on nor discussed any federal questions in its decision below.

3. Whether the Hawai`i State courts violated Petitioner Artemio Abad's due process rights during foreclosure proceedings where the United States Bankruptcy Court for the District of Hawai`i ("Bankruptcy Court") lifted the Bankruptcy Stay and permitted the sale of Petitioners' mortgaged properties with "in rem" relief.

LIST OF PARTIES

The parties below were:

1. Artemio Marcos Abad, Individually and as Trustee of the Artemio M. Abad Revocable Trust (Plaintiff below and now Petitioner) (hereinafter "Artemio")

2. Gloria Pascua Abad, Individually and as Trustee of the Gloria P. Abad Revocable Trust (Plaintiff below and now Petitioner) (hereinafter "Gloria")

3. Finance Factors, Limited (Defendant below and now Respondent) (hereinafter "FF")

4. Central Pacific Bank, successor-In-Interest to City Bank (Defendant below and now Respondent) (hereinafter "CPB")

5. Director of Budget and Fiscal Services, City and County of Honolulu (Defendant below)

6. American General Finance, Inc. (Defendant below)

7. Erlinda Gonzales and Wilson U. Pascua, Individually and dba Honland Realty (Defendants below)

8. Jennifer Abad (Defendant below)

STATEMENT PURSUANT TO RULE 29.6

FF is a wholly owned subsidiary of Finance Enterprise, Limited, a Hawai`i corporation that owns all of FF's stock.

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COUNTERSTATEMENT OF JURISDICTION

Petitioners attempt to invoke this Court's jurisdiction under 28 U.S.C. section 1257 on the basis of alleged violations of federal constitutional law. FF disagrees. First and foremost, the matter raised by Petitioners is moot. Additionally, as fully discussed below, the decision of the Appeals Court which Petitioners seek review did not involve a federal question. Hence, jurisdiction is not properly invoked.

COUNTERSTATEMENT OF THE CASE

1. Background

Petitioners Artemio and Gloria are married and previously owned 2 parcels of residential real property in Honolulu, Hawai`i. They defaulted on their financial obligations and their creditors, FF and CPB, sought foreclosure of their mortgaged properties. After Petitioners filed multiple defective bankruptcy petitions, the Bankruptcy Court eventually allowed the sale of Petitioners' mortgaged properties pursuant to *in rem* orders. Petitioners did not appeal the Bankruptcy Court's *in rem* orders. Petitioners' mortgaged properties were sold on October 8, 2002, to good faith purchasers. Although they appealed the foreclosure proceedings twice to the Hawai`i Appeals Court, Petitioners did not seek to stay the orders allowing foreclosure of their properties. In the 2009 Summary Disposition Order, the decision that dismissed Petitioners' second appeal and which Petitioners seek

substantive review by this Court, the Appeals Court found Petitioners' challenge of the foreclosure proceedings moot under Hawai`i law. The Supreme Court of Hawai`i denied Petitioners' request to review the Appeals Court's Summary Disposition Order.

2. The Underlying Dispute

On March 28, 2001, CPB filed a complaint against Artemio and Gloria (collectively "Petitioners"), along with the other defendants below, for money judgment and foreclosure of Petitioners' property at 3345 Ala Akulikuli Street in Honolulu, Hawai`i. CPB's complaint was filed in the Circuit Court of the First Circuit, State of Hawai`i (a trial level court referred to hereafter as the "Circuit Court").

On April 23, 2001, FF filed a Crossclaim against the Petitioners and the defendants below alleging default on a promissory note in favor of FF, and sought a money judgment against the Petitioners and foreclosure of their properties at 3345 Ala Akulikuli Street and 98-1457 Hoomahie Loop in Honolulu, Hawai`i (collectively the "Mortgaged Properties").

On May 24, 2001, after Petitioners and defendants below failed to respond to pleadings, FF moved for entry of default judgment and for an interlocutory decree of foreclosure against the Petitioners and defendants below. Petitioners and Jennifer Abad, their daughter and defendant below, then filed numerous defective bankruptcy petitions:

1. On June 20, 2001, Gloria filed a Voluntary Petition for Bankruptcy in Br. No. 01-02461. On July 13, 2001, Br. No. 01-02461 was dismissed for Gloria's failure to satisfy the bankruptcy filing requirements.

2. On August 7, 2001, Artemio filed a Voluntary Petition for Bankruptcy in Br. No. 01-03144. On August 28, 2001, Br. No. 01-03144 was dismissed for Artemio's failure to satisfy the bankruptcy filing requirements.

3. On October 2, 2001, Jennifer filed a Voluntary Petition for Bankruptcy in Br. No. 01-03867. Br. No. 01-03867 was voluntarily dismissed on October 18, 2001.

4. On November 21, 2001, Jennifer filed another Voluntary Petition for Bankruptcy in Br. No. 01-04564, which was dismissed on December 11, 2001, for Jennifer's failure to satisfy the bankruptcy filing requirements.

On March 4, 2002, the Circuit Court entered an order granting FF's motion for default judgment against defendants below and an interlocutory decree of foreclosure ("FF Foreclosure Decree"). On June 20, 2002, the Circuit Court entered a similar order in favor of CPB ("CPB Foreclosure Decree").

On July 1, 2002, the day of the foreclosure sale of the Mortgaged Properties, Gloria again filed a Voluntary Petition for Bankruptcy in Br. No. 02-02358.

To proceed with foreclosure, CPB and FF moved the Bankruptcy Court to lift the stay in Gloria's Bankruptcy case. On August 8, 2002, the Bankruptcy Court entered its first *in rem* order lifting the stay and permitting FF's foreclosure sale of the Mortgaged Properties. *See* Order Granting Movant and Secured Creditor Finance Factors, Limited's Motion for Relief From the Automatic Stay. (Respondent FF's Appendix ("Resp't.App.") 1.) On September 9, 2002, the Bankruptcy Court entered its second *in rem* order lifting the stay in Gloria's bankruptcy action and permitting CPB to proceed with foreclosure of the property mortgaged under the CPB note. (Petitioners' Appendix ("Pet'r.App.") 1.) Hereinafter, the August 8, 2002 and September 9, 2002 *in rem* orders shall be collectively referred to as the "*in rem* orders."

Petitioners did not appeal the decisions of the Bankruptcy Court or otherwise challenge the validity of the *in rem* orders, nor did they seek to stay either the FF Foreclosure Decree or the CPB Foreclosure Decree (collectively the "Foreclosure Decrees"). Rather, on September 4, 2002, Artemio filed another Voluntary Petition for Bankruptcy, which was dismissed on October 29, 2002, on the motion of the Office of the Bankruptcy Trustee. The Mortgaged Properties were sold on October 8, 2002.

3. Petitioners' First Appeal And Post-Appeal "Motion to Set Aside"

Petitioners filed three (3) separate appeals before the Appeals Court in Hawai'i. The appeals were consolidated and on January 12, 2005, the Appeals Court issued a written opinion in *City Bank v. Abad*, 105 P.3d 1212 (Haw. 2005). For the first time on appeal, Petitioners challenged the validity of the Bankruptcy Court's *in rem* orders by alleging the Appeals Court did not have subject matter jurisdiction to permit foreclosure of the Mortgaged Properties. *Id.* at 1217. The Appeals Court unequivocally held that Petitioners failed to satisfy their appellate burden to challenge the Bankruptcy Court's *in rem* orders. *Id.* The Appeals Court refused to invalidate the *in rem* orders and rejected Petitioners' claim that the Circuit Court lacked jurisdiction to enter the Foreclosure Decrees.

On February 21, 2006, more than a year after the Appeals Court issued its decision dismissing the Petitioners' appeals in *City Bank*, the Petitioners returned to Circuit Court and filed a motion to set aside the Foreclosure Decrees by asserting that the Bankruptcy Court's *in rem* orders were void for due process violations ("Motion to Set Aside"). Despite Petitioners' submission of the entire Bankruptcy Court record for Gloria Abad's Bankruptcy Case Br. No. 02-02358, the Circuit Court denied the motion. (Pet'r.App.5.)

4. The Opinion Below

Petitioners filed a second appeal to the Appeals Court and argued the Circuit Court erred in denying the Motion to Set Aside. Claiming a violation of Artemio's due process rights for lack of notice, Petitioners resurrected their challenge to the validity of the Bankruptcy Court's *in rem* orders as applied to Artemio, a non-debtor co-owner of the Mortgaged Properties.[1] Petitioners alleged that Artemio was not a party to Gloria's bankruptcy and had not received notice or an opportunity to be heard before the stays were lifted *in rem* in Gloria's bankruptcy case. On December 28, 2009, the Appeals Court entered its Summary Disposition Order dismissing Petitioner's appeal for mootness. (Pet'r.App.8.) Highlighting Petitioners' failure to obtain a stay of the Foreclosure Orders, coupled with the sale of the Mortgage Properties to good faith purchasers, the Appeals Court dismissed Petitioners' appeal citing Hawai i law. (Pet'r.App.20.) Upon finding the matter moot, the Appeals Court found it "unnecessary to reach [Petitioners'] other arguments on appeal." (Pet'r.App.20.)

[1] The reference to Artemio as a non-debtor is in relation to Gloria's bankruptcy case. Although Artemio was technically a debtor in relation to *his* bankruptcy case, for purposes of this Brief "debtor" refers to Gloria and "co-owner" refers to Artemio.

Petitioners then sought a writ of certiorari before the Supreme Court of Hawai`i, which was ultimately denied on May 21, 2010. (Pet'r.App.21.)

ARGUMENT

The Appeals Court's Summary Disposition Order, and the Supreme Court of the State of Hawai`i's ("Hawai`i Supreme Court") denial of certiorari, is correct. The Appeals Court held Petitioners' case moot on Hawai`i law without deciding any federal issues. The Hawai`i Supreme Court properly denied Petitioners' writ to challenge the Summary Disposition Order. Additionally, Petitioners were afforded their due process during the entirety of the foreclosure proceedings. Further review by this Court is therefore not warranted.

I. PETITIONERS' CASE IS MOOT

"In general a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). The failure to stay a foreclosure order will render appellate review moot if the property at issue is sold to a good faith purchaser. *See Oakville Dev. Corp. v. Federal Deposit Ins. Corp.*, 986 F.2d 611, 613 (1st Cir. 1993); *In re Sullivan Cent. Plaza I, Ltd.*, 914 F.2d 731, 733 (5th Cir. 1990); *Duncan v. Farm Credit Bank*, 940 F.2d 1099, 1104 (7th Cir. 1991); *Nat'l Mass Media Telecomm. Sys. v.*

Stanley, 152 F.3d 1178, 1180 (9th Cir. 1998); *In re Kahihikolo*, 807 F.2d 1540, 1542 (11th Cir. 1987).

First, in this case, the issues raised by Petitioners were dismissed by the Appeals Court for mootness. Second, the issues remain moot because the Mortgaged Properties were sold to good faith purchasers on October 8, 2002. Third, during the long course of litigation by Petitioners, they failed to seek a stay of the Foreclosure Orders. Finally, now eight years later, Petitioners have no legal interest in the Mortgaged Properties, nor can judicial process reinstate any interest that Petitioners might have previously enjoyed.

II. THE COURT LACKS JURISDICTION OVER THE PETITIONED MATTER

Petitioners failed to properly invoke the Court's jurisdiction under 28 U.S.C. § 1257(a). The challenged Summary Disposition Order of the Appeals Court never raised any question of federal law. As noted, *supra*, the Appeals Court dismissed Petitioners' appeal for mootness under Hawai`i law and found it "unnecessary to reach [Petitioners'] other arguments on appeal." (Pet'r.App.20.) It "is essential to the jurisdiction of the Supreme Court under [28 U.S.C. section] 1257(a) that a substantial federal question has been properly raised in the state court proceedings." Eugene Gressman et al., *Supreme Court Practice* § 3.16, at 180-81 (9th ed. 2007). This Court has made clear that where, as here, "the highest state

court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question." *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) (internal citations omitted). As this Court further noted, "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Id.* at 90 (internal citation omitted).

In this case, Petitioners' appeal before the Appeals Court was not decided on a federal question, but upon the application of Hawai`i law on mootness. The result leaves this Court without jurisdiction under 28 U.S.C. § 1257(a) to review the judgment of the Appeals Court. The petition for writ of certiorari, accordingly, should be denied.

III. THE HAWAI`I STATE COURTS DID NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS

The whole premise of the Petitioners' due process violation argument is that Artemio did not have actual knowledge of, or participate in, what happened between the initial filing of Gloria's bankruptcy case and the entry of the *in rem* orders. The Circuit Court entered the Foreclosure Decrees after Petitioners failed to respond and defend themselves in

the foreclosure proceedings. The Bankruptcy Court, in permitting the sale of the Mortgage Properties by lifting the Bankruptcy Stay, considered Petitioners' due process rights and held:

> the relief is being granted "in rem" because the Debtor (Gloria) and other persons who claim an interest in the Property (including Artemio) have not acted in good faith to reorganize or seek discharge of their debts under the Bankruptcy Code, but rather have used the filing of a bankruptcy case as an obstruction to a lender's efforts to foreclosure on mortgaged property. As used herein, "in rem" relief means that the relief from stay is granted not only personally against the Debtor but with respect to the subject property; and shall be deemed binding and of full force and effect in any subsequent bankruptcy case, whether commenced by a debtor in this case or any other individual or entity claiming an interest in the subject property.

Pet'r.App.2. Petitioners never raised a due process violation argument until their Motion to Set Aside on February 21, 2006, well after the sale of the Mortgaged Properties and after their first appeal in *City Bank*. Neither Artemio nor the other defendants below had their due process rights violated during the foreclosure proceedings.

The factual record below demonstrates that Artemio had actual knowledge of the *in rem* orders. However, even if he did not, actual notice is not strictly required when a debtor has been abusing the

bankruptcy system. All that is required is "notice as is appropriate in the particular circumstances." *In re Fernandez*, 212 B.R. 361, 370 (Bankr. C.D. Cal. 1997), *aff'd*, 227 B.R. 174 (B.A.P. 9th Cir. 1998) ("*Fernandez I*") (quoting 11 U.S.C. § 102(1)(A) (2006)). Under the appropriate circumstances, constructive notice to the co-owner, *e.g.*, Artemio, of property at issue is sufficient to satisfy due process concerns, and adversary proceedings against the co-owner need not be brought. *See In re Roeben*, 294 B.R. 840, 848 (Bankr. E.D. Ark. 2003) (finding that debtor and spouse acted in concert to abuse the automatic stay provisions of the Bankruptcy Code and charging spouse with constructive knowledge of debtor's bankruptcy proceedings); *In re Feldman*, 309 B.R. 422, 429 (Bankr. E.D.N.Y. 2004) (holding that if the Court had *in rem* jurisdiction over the subject property, an adversary proceeding need not be commenced in order to enter prospective relief from stay as to a non-debtor).

In *Fernandez I*, the debtor filed his first bankruptcy petition on the eve of the bank's foreclosure on his home. In subsequent months, his case was dismissed and his wife filed 2 bankruptcy petitions, which were also dismissed. *In re Fernandez*, 227 B.R. 174, 176 (B.A.P. 9th Cir. 1998) ("*Fernandez II*"). Two days before the bank's rescheduled foreclosure sale, the debtor conveyed as a gift half of his interest in his home to Belinda Amador, who filed for bankruptcy the next day. *Id.* The debtor then filed another bankruptcy petition. *Id.* Without notice to the debtor, the

bank obtained an *in rem* order lifting the automatic stay in Ms. Amador's bankruptcy case and sold the property. *Fernandez I*, 212 B.R. at 364. The debtor brought a motion to vacate the dismissal after the court dismissed the debtor's second bankruptcy case. The debtor claimed that if he was not granted the relief he sought, he would lose his home without notice and the opportunity for a hearing, and that the *in rem* order and foreclosure in the Amador case deprived him of his constitutionally-guaranteed due process of law. *Fernandez I*, 212 B.R. at 365. The court examined the record and applicable law and noted that the Bankruptcy Code only requires notice "as is appropriate in the particular circumstances." *Id.* at 370 (quoting 11 U.S.C.A. § 102(1)(A)). The court, emphasizing the history and timing of the debtor, his wife, and Ms. Amador's bankruptcy filings, charged the debtor with *constructive* notice of Ms. Amador's filings. Mindful of due process considerations, the court explained that "there may come a point when common sense and equitable principles should step in to limit a debtor's right to the protections afforded by the automatic stay." *Id.*

In the instant case, Artemio received the necessary notice of the *in rem* orders. Petitioners' arguments are substantially identical to those unsuccessfully raised by debtors in *Fernandez I*. As the debtor in *Fernandez I* received appropriate notice to satisfy his right to due process, so did Artemio and the other defendants below. Therefore, none of the Petitioners, including Artemio, had their rights to due

process violated during the foreclosure proceedings of the Mortgaged Properties.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH J. MANSFIELD
Counsel of Record
DONALD K.O. WONG
PAUL B.K. WONG
MCCORRISTON MILLER MUKAI
MACKINNON LLP
P.O. Box 2800
Honolulu, HI 96803-2800
(808) 529-7300

McCORRISTON MILLER MUKAI MacKINNON LLP
DONALD K. O. WONG #909-0
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
Telephone: 529-7300

Attorney for Movant and Secured Creditor
FINANCE FACTORS, LIMITED

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re GLORIA P. ABAD Debtor.	Case No. 02-02358 (Chapter 7) ORDER GRANTING MOVANT AND SECURED CREDITOR FINANCE FACTORS, LIMITED'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY; EXHIBIT "A" **DATE: August 7, 2002** **TIME: 1:30 p.m.** **JUDGE: Hon. Robert J. Faris**

12881/51659
(19093v1)

ORDER GRANTING MOVANT AND SECURED CREDITOR FINANCE FACTORS, LIMITED'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY

(Filed Aug. 2, 2008)

Movant and Secured Creditor Finance Factors, Limited ("Factors") filed its Motion for Relief from the

Automatic Stay (the "Motion") herein on July 11, 2002. July 23, 2002, was the expiration date for the time within which anyone could file an opposition to Factors' Motion. There was no opposition filed to said Motion.

The Court has carefully considered the Motion, the Notice of Hearing, the Memorandum in Support of the Motion, the Declaration of Michael Sakai in Support of the Motion, the Declaration of Donald K. O. Wong, and all other relevant documents contained in the file herein, and based upon such consideration, and upon the Court's finding that no response to the Motion was timely filed as required under Local Bankruptcy Rule 4001-1(a)(3)(A), it is hereby ORDERED THAT:

Pursuant to Local Bankruptcy Rule 4001-1(a)(3)(B) the aforesaid Motion is granted, and the automatic stay of 11 U.S.C. 362(a) as imposed against Factors with respect to the Debtor, Debtor's Estate, and that certain real property located at 98-1457 Hoomahie Loop, Pearl City, Hawaii, and that certain real property located at 3345 Ala Akulikuli Street, Honolulu, Hawaii (collectively the "Property"), of which a copy of the description of the Property is attached hereto as Exhibit "A", and made a part hereof, is hereby terminated; and

Further, that Factors, its attorney, its agents, any foreclosure commissioner or successor commissioner can proceed to exercise any and all of their rights and remedies with respect to the Property, including but not

limited to, foreclosure of Factors' Mortgage against the Property and recovery of possession of said Property.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the relief is being granted "in rem" because the Debtor and other persons who claim an interest in the Property have not acted in good faith to reorganize or seek discharge of their debts under the Bankruptcy Code but, rather have used the filing of a bankruptcy case as an obstruction to a lender's efforts to foreclose on mortgaged property. As used herein, "in rem" relief means that the relief from stay is granted not only personally against the Debtor but with respect to the subject property; and shall be deemed binding and of full force and effect in any subsequent bankruptcy case, whether commenced by a debtor in this case or any another individual or entity claiming an interest in the subject property. This in rem relief shall be effective only until the earlier of (i) 240 days after the date of entry of this order, or (ii) the recovery of possession by a purchaser at a judicial or non-judicial sale upon foreclosure of the subject mortgage.

It is hereby ordered that Factors may not obtain a deficiency judgment without further order of this court.

DATED: Honolulu, Hawaii, AUG 08 2002.

/s/ Robert J. Faris
UNITED STATES
BANKRUPTCY JUDGE